(9)

No. 94-790-CFX
Status: GRANTED

Title: Janet Reno, Attorney General, et al., Petitioners
v.
Ziya K. Koray

Docketed:
November 1, 1994

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ghilardi,Melinda C., Rochman,Irwin

9-8-94 ext til 10-15-94, and 10-11-94 ext til 11-1-94, J. Souter, CITED.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Sep 2 1994 | G | Application (A94-166) to extend the time to file a petition for a writ of certiorari from September 15, 1994 to October 15, 1994, submitted to Justice Souter. |
| 2 | Sep 8 1994 | | Application (A94-166) granted by Justice Souter extending the time to file until October 15, 1994. |
| 3 | Oct 7 1994 | G | Application (A94-166) to extend further the time to file a petition for a writ of certiorari from October 15, 1994 to November 1, 1994, submitted to Justice Souter. |
| 4 | Oct 11 1994 | | Application (A94-166) granted by Justice Souter extending the time to file until November 1, 1994. |
| 5 | Nov 1 1994 | G | Petition for writ of certiorari filed. |
| 7 | Nov 22 1994 | | Order extending time to file response to petition until December 23, 1994. |
| 9 | Dec 23 1994 | | Brief of respondent Ziya K. Koray in opposition filed. |
| 10 | Dec 23 1994 | G | Motion of respondent for leave to proceed in forma pauperis filed. |
| 8 | Dec 28 1994 | | DISTRIBUTED. January 13, 1995 (Page 2) |
| 11 | Dec 29 1994 | X | Reply brief of petitioner filed. |
| 14 | Jan 12 1995 | | Letter from the Solicitor General received and distributed. |
| 12 | Jan 13 1995 | | Motion of respondent for leave to proceed in forma pauperis GRANTED. |
| 13 | Jan 13 1995 | | Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 23, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, March 23, 1995. Rule 29.2 does not apply. |
| | | | ********** |
| 15 | Feb 2 1995 | | SET FOR ARGUMENT MONDAY, APRIL 24, 1995. (1ST CASE). |
| 19 | Feb 21 1995 | | Record filed. |
| | | * | Original record proceedings United States District Court for the Middle District of Pennsylvania. |
| 20 | Feb 21 1995 | | Record filed. |
| | | * | Partial record proceedings United States Court of Appeals for the Third Circuit. |
| 16 | Feb 22 1995 | | Joint appendix filed. |
| 17 | Feb 22 1995 | | Brief of petitioner United States filed. |
| 18 | Feb 22 1995 | | LODGING consisting of three copies of the Bureau's |

2 pp

No. 94-790-CFX

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| | | | Sentence Computation Manual, the Bureau's Program Statements and of Waldorf v. United States, No. C-74-339(W.D. Tenn 1975) (Unpublished). |
| 21 | Mar 3 1995 | | CIRCULATED. |
| 22 | Mar 23 1995 | | LODGING by respondent. 10 copies each of Bureau of Prison's Program Statement and an Operations Memorandum. |
| 23 | Mar 23 1995 | | Brief of respondent filed. |
| 24 | Mar 23 1995 | X | Brief amicus curiae of USC Law Center's Post-Conviction Justice Project filed. |
| 25 | Apr 14 1995 | X | Reply brief of petitioners filed. |
| 26 | Apr 24 1995 | | ARGUED. |

Supreme Court, U.S.
FILED
94 790 NOV 1 1994
OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

ZIYA K. KORAY

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

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## QUESTION PRESENTED

Section 3585 of 18 U.S.C. provides that a defendant generally must "be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." The question presented is whether a federal prisoner must receive credit on his sentence under Section 3585 for time when he was released on bail pursuant to the Bail Reform Act of 1984.

## PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following are petitioners in this Court: United States Bureau of Prisons and Frank Sizer, warden, Allenwood Federal Prison Camp, Allenwood, Pennsylvania.

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# In the Supreme Court of the United States

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No.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

ZIYA K. KORAY

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

The Solicitor General, on behalf of the Attorney General of the United States and all other petitioners, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

### OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-24a) is reported at 21 F.3d 558.

### JURISDICTION

The judgment of the court of appeals was entered on April 25, 1994. A petition for rehearing was denied on June 17, 1994. App., *infra*, 29a-30a. On September 8, 1994, Justice Souter extended the time within which to file a petition for a writ of certiorari

to and including October 15, 1994. App., *infra*, 31a. On October 11, 1994, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including November 1, 1994. App., *infra*, 32a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 3585 of Title 18 provides:

> Calculation of a term of imprisonment
>
> (a) Commencement of sentence.—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.
>
> (b) Credit for prior custody. A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> > (1) as a result of the offense for which the sentence was imposed; or
> >
> > (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

## STATEMENT

1. On April 23, 1991, respondent was arrested for laundering monetary instruments, in violation of 18 U.S.C. 1956(a)(1). On June 18, 1991, he entered a

guilty plea to that offense in the United States District Court for the District of Maryland. On June 25, 1991, a federal magistrate judge ordered respondent released on bail pending sentencing on condition that respondent reside at a Volunteers of America community treatment center. On October 21, 1991, the district court sentenced respondent to 41 months' imprisonment. Respondent remained at the Volunteers of America facility until November 25, 1991, the date on which he was ordered to surrender for service of his sentence. Respondent then reported to Allenwood Federal Prison Camp in Pennsylvania. App., *infra*, 2a.

Invoking Bureau of Prisons (BOP or Bureau) administrative procedures, respondent sought credit against his sentence for the 150 days that he spent at the community treatment center between June 25 and November 25, 1991. Relying on its established policy, BOP declined to grant the requested credit. After exhausting his administrative remedies, respondent filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania seeking credit for the time he spent in the community treatment center. The district court denied the petition, finding that respondent's stay at the community treatment center did not constitute "official detention" within the meaning of 18 U.S.C. 3585(b), which governs credit for time spent in detention before the commencement of a sentence. App., *infra*, 25a-28a.

2. The court of appeals reversed. App., *infra*, 1a-24a. The court acknowledged that, with the exception of the Ninth Circuit, "most [courts of appeals] have concluded that section 3585 * * * does not require the Bureau to credit presentenced defendants

whose bail conditions allowed them to be confined outside of Bureau of Prison[s] facilities." *Id.* at 7a. The court declined, however, to defer to BOP's view that the phrase "official detention" in Section 3585(b) does not include restrictive conditions of bail. The court explained that the statutory language need not be read "as if it provided 'official detention *by the Attorney General or the Bureau of Prisons*,' " since "there is nothing in the statute which requires or suggests that a defendant must be under the detention of the Bureau" and "[a] court may 'detain' a person as 'official[ly]' as the Attorney General." App., *infra*, 13a-14a.

The court also found that the Bureau's interpretation of the statute was not worthy of deference because it appears in a "Program Statement" rather than in "published regulations subject to the rigors of the Administrative Procedure Act, including public notice and comment." App., *infra*, 9a. Finally, the court placed considerable weight on its belief that BOP followed a "functional" approach to the credit issue under the predecessor statute, 18 U.S.C. 3568 (repealed). According to the court, that functional analysis focused on the restrictiveness of the bail conditions placed on a defendant, and the prior policy might have allowed respondent to obtain credit for his stay at the community treatment center. App., *infra*, 9a-13a.

The court concluded that " 'official detention' for purposes of credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement." App., *infra*, 23a. Although the court did not define that concept with precision, it believed that its approach would not be difficult to administer, because "only a small percentage of federal defendants are

released to a halfway house," and because the Bureau had experience applying the different but related functional approach to Section 3585(b) adopted by the Ninth Circuit. App., *infra*, 21a-22a. The court remanded the case to the district court to determine whether respondent was in "jail-type" confinement during the time that he was at the community treatment center. *Id.* at 24a. Subsequently, respondent was released pending further proceedings in the court of appeals and the district court. *Id.* at 51a.

## REASONS FOR GRANTING THE PETITION

The court of appeals' holding creates a three-way split in the circuits. Seven courts of appeals have sustained the Bureau of Prisons' interpretation of 18 U.S.C. 3585(b): a defendant released on bail, even under restrictive conditions, is not in "official detention" and thus is not entitled to credit against his sentence for that period. The Ninth Circuit, however, previously rejected that approach and required the Bureau to give credit to a defendant who was given bail under conditions found to approach those of incarceration. In this case, the Third Circuit rejected the Bureau's view and adopted what it believed to be a more restrictive variation on the Ninth Circuit's rule, requiring the Bureau to conduct a case-by-case analysis to determine whether a defendant was released on bail into "jail-type" conditions.

The disarray on this issue warrants this Court's intervention. Neither the Third nor the Ninth Circuit has adequately justified its rejection of the Bureau's construction of Section 3585(b), and the case-by-case regime mandated for prisoners in those circuits creates considerable practical difficulties. Moreover, the absence of a national rule governing

credit issues creates inequities in the treatment of similarly situated prisoners and compels the Bureau to administer three different approaches in determining the proper length of a defendant's sentence. This Court's review is required to reinstate the Bureau's longstanding policy on a nationwide basis.

1. The Third Circuit's ruling in this case exacerbates an existing conflict on the proper interpretation of Section 3585(b). Before the Third Circuit's decision in this case, every court of appeals that had considered the question, except for the Ninth Circuit, see *Mills* v. *Taylor*, 967 F.2d 1397, 1400-1401 (1992), had held that restrictive conditions of release on bail are not "official detention" under Section 3585(b). See *Moreland* v. *United States*, 968 F.2d 655 (8th Cir.) (en banc) (time spent in halfway house not creditable), cert. denied, 113 S. Ct. 675 (1992); *United States* v. *Edwards*, 960 F.2d 278, 282-283 (2d Cir. 1992) (home confinement not creditable); *Pinedo* v. *United States*, 955 F.2d 12, 14 (5th Cir. 1992) (per curiam); *United States* v. *Becak*, 954 F.2d 386, 387-388 (6th Cir.) ("physical incarceration [required] to receive credit for presentence detention"), cert. denied, 112 S. Ct. 2286 (1992); *United States* v. *Zackular*, 945 F.2d 423, 425 & n.2 (1st Cir. 1991) (home confinement not creditable); *United States* v. *Insley*, 927 F.2d 185, 186 (4th Cir. 1991) (no credit for home confinement, because only "full physical incarceration" satisfies statutory requirement); *United States* v. *Woods*, 888 F.2d 653, 655-656 (10th Cir. 1989) (halfway house confinement not creditable), cert. denied, 494 U.S. 1006 (1990).

The Ninth Circuit, in *Mills* v. *Taylor*, *supra*, departed from that approach and concluded that "offi-

cial detention" includes conditions that "approach * * * incarceration," even if the defendant is actually released on bail subject to a requirement to dwell in a community treatment facility. 967 F.2d at 1400. And, in this case, the Third Circuit stated that, "[w]hile we do not go as far as does the Ninth Circuit[,] which appears to authorize credit for confinement under somewhat less restrictive conditions," the term "official detention" in Section 3585(b) includes release on bail into "jail-type confinement." App., *infra*, 23a. This Court's review is needed to restore uniformity to this important area of prison administration.

2. The Bureau's interpretation is supported by the text of Section 3585(b), its history, and principles of administrative deference. The Third Circuit erred in rejecting it.

a. Section 3585(b) states that a defendant "shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention" before beginning service of his sentence. The phrase "official detention" in Section 3585(b) should be construed in light of the related statutory provisions that authorize pre-trial restraints on a defendant's liberty, including detention by the Attorney General. The relationship among those provisions "leads to the conclusion that 'official detention' means incarceration." *United States* v. *Becak*, 954 F.2d at 388; accord *Moreland* v. *United States*, 968 F.2d at 662 (Loken, J., concurring). The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, provides a court with only two choices. A defendant who is admitted to bail is considered "released," even when his release is conditioned on his residence in a treatment center. See 18 U.S.C. 3142(c)(1)(B)(x). A defendant is "detained" only when he is denied bail—a ruling that

results in his being "committed to the custody of the Attorney General for confinement in a corrections facility" pending trial and sentence. 18 U.S.C. 3142 (i)(2). Thus, the only "detention" that a defendant may suffer "official[ly]" by virtue of a court order is detention of the type contemplated by the Bail Reform Act of 1984.[1]

The appropriateness of construing Section 3585(b) in light of the statutory provisions governing bail is confirmed by the common origins of these provisions. Congress enacted both the bail provisions and Section 3585(b) as part of the same statute, the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976.[2] That legislation worked a

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[1] That view is also confirmed by Congress's use of the phrase "official detention" in Section 3585(a), because basic canons of construction suggest that the phrase should bear the same meaning in each of the two subsections. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); see also *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993). Section 3585(a) provides that a

> sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

The phrase "official detention facility" in that provision refers to a place designed for the incarceration of offenders and under the control of corrections officers, not the type of treatment facility where respondent was "confined."

[2] The provisions of the Comprehensive Crime Control Act of 1984 relating to bail are known as the Bail Reform Act of 1984. Pub. L. No. 98-473, Tit. II, ch. I, 98 Stat. 1976. The provisions of the Act relating to sentencing, including the credit provision at issue here, are known as the Sentencing Reform Act of 1984. Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987.

broad and far-reaching reform of bail and sentencing practices. As this Court recognized in resolving another controversy that resulted from the same reforms, Congress must have been aware of the definitions it gave to statutory terms in the "related legislative enactments" and must have "legislated with reference to [them]." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407-408 (1991).

b. The history of the credit provision underscores its close ties to bail determinations. The original credit provision was enacted in 1932 to clarify when a federal sentence began to run, where BOP had transferred the prisoner from one place of confinement to another. See 18 U.S.C. 709a (1934) (credit for time spent in jail awaiting transfer). The statute "retained th[at] limited thrust until 1960, when Congress sought to clarify whether, under statutes requiring the imposition of a minimum mandatory sentence, the court was free to give recognition to the time a defendant had spent in jail for want of bail." *Ochoa* v. *United States*, 819 F.2d 366, 371 (2d Cir. 1987); see also *United States* v. *Peterson*, 507 F.2d 1191, 1193 (D.C. Cir. 1974) (per curiam). Accordingly, in 1960 Congress required the Attorney General to grant a convicted defendant credit against his sentence "for any days spent *in custody* prior to the imposition of sentence * * * *for want of bail set* for the offense under which sentence was imposed." Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1(a), 74 Stat. 738 (emphasis added).

Congress returned to the credit statute in the Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 217, when it deleted the statutory reference to "want of bail" and made credit available for offenses that did not call for a mandatory minimum sentence. The

Committee Report that accompanied that legislation indicates that the express reference to bail was deleted to clarify that credit should be available for offenses made "nonbailable" by law, and also in cases when the defendant was "not released for some reason other than lack of bail." S. Rep. No. 750, 89th Cong., 1st Sess. 21-22 (1965). In light of that explanation, the lower courts interpreted the 1966 Act to require credit only for defendants who were imprisoned before trial, and rejected claims that onerous conditions of bail could amount to "custody" under the statute. As the D.C. Circuit explained,

> the purpose of Congress was to benefit those who were not released; there was no intention to extend credit to those who were released. Had Congress, in amending the statute, intended to give credit to those who were released pending trial or appeal we think Congress would have said so in plain language; certainly there would have been some discussion of this novel proposal in the reports on the legislation.

*United States* v. *Peterson*, 507 F.2d at 1193. The court thus concluded that " 'in custody' * * * means detention or imprisonment in a place of confinement and does not refer to the stipulations imposed when a defendant is at large on conditional release." *Id.* at 1192. See also *Ortega* v. *United States*, 510 F.2d 412, 413 (10th Cir. 1975) (per curiam); *Polakoff* v. *United States*, 489 F.2d 727, 730 (5th Cir. 1974) (Wisdom, J.).[3]

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[3] With the exception of the Ninth Circuit, see *Brown* v. *Rison*, 895 F.2d 533, 536 (1990), all courts of appeals that have since considered the question under the predecessor statute, 18 U.S.C. 3568 (which remains in force with respect to sentences imposed before November 1, 1987), have con-

There is no indication that Congress, in rewording the credit provision as part of the Comprehensive Crime Control Act of 1984, disagreed with the then-unanimous weight of authority that denied any credit to defendants who had secured their release on bail. Rather, as this Court previously stated in construing Section 3585(b), "[i]t is not lightly to be assumed that Congress intended to depart from a long established policy" followed under the predecessor provision. *United States* v. *Wilson*, 112 S. Ct. 1351, 1355 (1992). While Congress in 1984 did "replace[] the term 'custody' with the term 'official detention,'" *ibid.*, the most plausible explanation for Congress's use of the "detention" formulation in Section 3585(b) was to conform the credit provision to the nomenclature used by the Bail Reform Act of 1984.[4]

c. The Third Circuit also failed to give proper deference to BOP's reasonable interpretation of the statute it administers. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984). Under *Chevron*, the first inquiry is whether the statute reveals an "unambiguously expressed intent of Congress" on "the precise question" addressed by the agency's interpretation. *Id.* at 843.

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cluded that a defendant is not entitled to credit for any time during which he was released on bail, even if the conditions of his release were quite restrictive. See, *e.g.*, *Randall* v. *Whelan*, 938 F.2d 522, 524 (4th Cir. 1991); *Ramsey* v. *Brennan*, 878 F.2d 995, 996 (7th Cir. 1989); *Mieles* v. *United States*, 895 F.2d 887, 888 (2d Cir. 1990); *United States* v. *Smith*, 869 F.2d 835, 837 (5th Cir. 1989).

[4] As the court below recognized, App., *infra*, 13a, every court of appeals to consider the question has held that the phrase "official detention" in Section 3585(b) means the same thing as the phrase "in custody" in the predecessor statute.

If it does, that ends the inquiry. *Id.* at 842-843. If, however, "the agency interpretation is not in conflict with the plain language of the statute, deference is due." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992). Deference is especially appropriate when "a full understanding of the force of the statutory policy in the given situation * * * depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations." *United States* v. *Shimer*, 367 U.S. 374, 382 (1961).

The Third Circuit did not dispute that BOP is the agency charged with the administration of Section 3585(b). See *United States* v. *Wilson*, *supra* (BOP, as designee of the Attorney General, computes credit after defendant begins his sentence). And that court did not find that Congress had a clear and unambiguous intention on "the precise question" at issue here —*i.e.*, whether credit must be awarded to defendants who have been ordered to comply with restrictive conditions of release. The court concluded, however, that deference is not due to the Bureau's interpretation of Section 3585(b), because that interpretation was not formally embodied in a regulation, and because the court believed that the Bureau's interpretation of the phrase "official detention" in Section 3585(b) is inconsistent with the Bureau's interpretation of the phrase "in custody" in former Section 3568. Neither objection has merit.

While an agency's informal interpretations of a statute it administers are "not entitled to the same deference as norms that derive from the exercise of * * * delegated lawmaking powers," those informal interpretations are "still entitled to some weight on judicial review." *Martin* v. *OSHRC*, 499 U.S. 144,

157 (1991). Here, BOP has embodied its views in a Program Statement that governs the day-to-day decisions of prison administrators nationwide. App., *infra*, 45a-50a; see also *id.* at 33a-44a. BOP's judgment reflects the type of expertise in explicating ambiguous statutory language that warrants judicial deference.

The court also erred in stating (App., *infra*, 9a-10a) that the Bureau of Prisons has taken inconsistent positions in administering the provisions governing credit issues. The Bureau has consistently denied credit to federal prisoners for time spent at a halfway house or other similar institutions as a condition of pre-trial release. In Program Statement No. 5880.24 (Sept. 5, 1979), which interpreted former Section 3568, the Bureau provided that "[j]ail time credit will be given for time spent in the custody of the Attorney General," that "[t]ime spent in residence in a residential community center * * * as a condition of bail or bond * * * is not creditable as jail time," and that "a 'highly restrictive' condition of bail or bond * * * is not considered as time in custody." App., *infra*, 36a, 37a-38a (emphasis omitted). That interpretation has been a consistent feature of the Bureau's administration of Section 3568. The Bureau's approach to Section 3585(b) thus accords with its practice under the predecessor provision.[5]

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[5] The court of appeals relied on a sentence in the Program Statement that indicated that "time spent in a *jail-type facility* * * * as a condition of bail or bond is creditable as jail time because of the greater degree of restraint." App., *infra*, 38a. Except when required by court order (see, *e.g.*, *Brown* v. *Rison*, *supra*), however, the Bureau never applied that statement to give credit to a defendant released to any type

3. The Third Circuit's error warrants correction by this Court. As we have noted, the Third Circuit's decision deepens an existing circuit conflict on the credit issue. Because of the importance of that issue to federal prison administration, we acquiesced two Terms ago in the petition filed in *Moreland* v. *United States*, 113 S. Ct. 675 (1992) (No. 92-458). Although the Court did not grant review in that case, the Third Circuit's decision to join the Ninth Circuit in rejecting the Bureau's construction of the credit statute has made clear that the circuit conflict will not be resolved through the en banc process in the circuit that created the division of authority. At the same time, the Third Circuit's claim that the approach it adopted does "not go as far as does the Ninth Circuit" in "authoriz[ing] credit for confinement under somewhat less restrictive conditions" (App., *infra*, 23a) indicates that the Bureau must henceforth administer three different interpretations of the credit statute.

The practical impact of the *ad hoc* approach followed by the Ninth and Third Circuits is not confined to those two circuits. The Bureau administers a national prison system and routinely transfers inmates between correctional facilities located in different judicial circuits to maintain security and population balance.[6] A large number of transferred inmates

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of community treatment facility, and that language was never otherwise invoked by the Bureau as the basis for any "functional approach" to the credit issue. That point is demonstrated by the numerous reported cases decided under the predecessor statute (see, *e.g.*, the cases cited in note 3, *supra*), which were litigated precisely because the Bureau granted no credit to the inmates involved.

[6] We are informed by BOP that during a four-year period ending in July 1994, 133,937 new inmates were admitted to

are likely to be incarcerated at some point in a correctional facility located in the Third or Ninth Circuit, because facilities in those two circuits together account for 30 percent of the Bureau's inmate population.[7] Because the means for obtaining judicial review of an administrative denial of sentence credit is an application for habeas corpus filed in the district of the inmate's confinement (see 28 U.S.C. 2241), any inmate transferred to a Bureau facility in one of those two circuits, even temporarily, can require a federal district court to determine whether the conditions of his release on bail were sufficiently onerous to warrant an award of credit under the law followed in that circuit.

The ruling below also requires BOP, in the first instance, to make factual determinations for which it rarely will have available pertinent and reliable information. For that reason, unlike the straightforward approach applied by the Bureau for decades, it is doubtful that the rule adopted by the Third Circuit can be implemented in a consistent fashion. And the rule is certain to generate cumbersome litigation about "matter[s] of judgment, or policy, or discretion" that are "not * * * susceptible of rational determination, at least by tools of inquiry available to judges." *Ramsey* v. *Brennan*, 878 F.2d at 996.

Under the Bureau's interpretation of Section 3585(b), the Bureau can make credit determinations

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Bureau facilities. A total of 213,512 inmate transfers among Bureau facilities occurred during the same period.

[7] There are a total of 22 correctional facilities in the Ninth and Third Circuits. As of September 15, 1994, the 12 federal institutions in the Ninth Circuit housed 12,749 inmates. The 10 institutions in the Third Circuit housed 13,135 inmates. The total inmate population at Bureau facilities on that date was 85,474.

on the basis of the documentary evidence that ordinarily accompanies the inmate after he is sentenced—the inmate's judgment of conviction and bail form. Those documents will ordinarily disclose whether the defendant was released on bail during the pendency of the proceedings, and on what conditions. Typically, however, those documents will not contain any description of precisely how "jail-like" those conditions were. The rule adopted by the Bureau therefore permits the Bureau to make credit determinations quickly and efficiently on the basis of information readily available from reliable law enforcement sources.

By contrast, the Third Circuit's case-by-case approach requires BOP to investigate and analyze the conditions applicable to federal prisoners who have spent time in any of the dozens of community treatment centers scattered around the United States.[8]

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[8] The practical problem is not limited to treatment centers or halfway houses. As the experience of the Ninth Circuit demonstrates, prisoners who suffered other forms of presentencing constraint will seek to expand the panel's holding to their individual circumstances. See, *e.g.*, *Fraley* v. *Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993) (per curiam) (prisoners required to stay at home pending trial); *Lahey* v. *Floyd*, 992 F.2d 234, 235-236 (9th Cir. 1993) (same); *United States* v. *Browning*, 761 F. Supp. 681, 682 (C.D. Cal. 1991) (same); see also *Grady* v. *Crabtree*, 958 F.2d 874, 875 (9th Cir. 1992) (prisoner confined at halfway house as a condition of post-trial probation); *United States* v. *Freeman*, 922 F.2d 1393, 1396-1397 (9th Cir. 1991) (prisoner claiming credit for time on pre-trial "probation"); *Malosh* v. *Crabtree*, 758 F. Supp. 620, 621 (D. Or. 1991) (prisoner required to reside on a military base as a condition of pre-trial release); *Chalamidas* v. *Quinlan*, No. CV-91-859-TSZ (W.D. Wash. Apr. 22, 1992) (special parolee seeking credit for time spent in a community treatment center as a condition of special

Those centers usually are owned and operated by private entities, such as the Volunteers of America facility at issue in this case, and impose a variety of different regimens on their residents. The records of those centers are not available to BOP as a matter of course. Moreover, BOP would be compelled to rely on the accuracy and reliability of representations of private centers that BOP does not control.

Even when there is no reason to doubt the reliability of the information furnished, that information may not significantly aid the Bureau in performing the task required by the decision below. The restrictiveness of bail conditions can vary even with respect to inmates who are required by the terms of their bail bonds to reside at the same treatment center. As the Third Circuit appeared to recognize (App., *infra*, 23a-24a), two residents of the same community center could be treated differently under that court's approach to the credit statute depending on whether one of them was permitted to leave for work during part of the day. Yet the number of possible permutations of restrictive conditions of bail is virtually limitless, because the Bail Reform Act of 1984 encourages judicial officers to innovate in fashioning conditions of release that will obviate the need for pre-trial incarceration, see 18 U.S.C. 3142(c)(1)(B).

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parole), dismissed in part, reversed in part, 981 F.2d 1257 (9th Cir. 1992) (No. 91-36314) (Table). A similar trend has already begun in the Third Circuit. Following its decision in this case, the Third Circuit ordered a hearing in the case of a defendant who, as a condition of bail, had been ordered to rent, and reside at, a condominium located in an exclusive Tampa, Florida, development, and to pay for private guards who would ensure that he appeared for trial. *Bilgrami* v. *Turner*, No. 93-7793 (July 13, 1994).

The Third Circuit speculated that its rule would be easy to administer because "few situations * * * will arise" (App., *infra*, 23a) in which an inmate will suffer restrictions that are sufficiently severe to warrant credit. That view is contradicted by the volume of litigation over the issue, as well as by the practical fact that a large number of inmates will have an enormous incentive to litigate about BOP's application of a "functional approach" in the context of their particular bail bonds. A rule that overturns the agency's longstanding policy, deviates from the law of other circuits, and invites so much unwarranted litigation calls for this Court's review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1994

**APPENDIX A**

Filed April 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 93-7357

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ZIYA K. KORAY, APPELLANT

*v.*

FRANK SIZER;
UNITED STATES BUREAU OF PRISONS;
ATTORNEY GENERAL OF THE UNITED STATES

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 92-01458)

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Submitted Pursuant to Third Circuit LAR 34.1
March 4, 1994

Before: SLOVITER, *Chief Judge*
COWEN and LEWIS, *Circuit Judges*

(Filed: April 25, 1994)

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OPINION OF THE COURT

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SLOVITER, *Chief Judge.*

I.

On April 23, 1991, Ziya Koray was arrested for laundering monetary instruments in violation of 18 U.S.C. § 1956(a)(1). On June 18, 1991, Koray entered a guilty plea. On June 25, 1991, a federal Magistrate Judge released Koray pursuant to 18 U.S.C. § 3142(c) & (h) (1988 & Supp. III 1991) into the custody of the Pretrial Services Agency and ordered him to be "confined to the premises of [the Volunteers of America 'halfway house type facility'] and shall not be authorized to leave for any reason unless accompanied by Special Agent Dennis Bass." App. at 17. On October 21, 1991, the district court sentenced Koray to 41 months imprisonment with two years of supervised release. Koray remained at the Volunteers of America halfway house until November 25, 1991, when he reported to the Allenwood Federal Prison Camp in Montgomery, Pennsylvania.

Koray received a credit of 64 days for the time spent in jail between April 23 and June 25 pursuant to 18 U.S.C. § 3585 (1988). However, the Bureau of Prisons declined to credit him for the approximately 150 days he was confined to the Volunteers of America facility. After exhausting his administrative remedies, Koray sought a writ of habeas corpus from the district court for the Middle District of Pennsylvania on October 15, 1992, arguing that the Bureau misapplied the statute in not crediting him for the time spent while "released" with restrictive conditions. The district court found that restrictive release conditions can never amount to "official detention" under section 3585(b) and denied the petition for a writ of habeas corpus. Koray filed this

timely appeal. The district court had jurisdiction under 28 U.S.C. § 2241 (1988). We have appellate jurisdiction under 28 U.S.C. § 1291 (1988) and review this question of statutory interpretation *de novo*.[1] *See Barden v. Keohane*, 921 F.2d 476, 479 (3d Cir. 1990).

II.

Credit for prior custody is determined by 18 U.S.C. § 3585(b), which provides:

> Credit for prior custody.—A defendant shall be given credit toward the service of a term of imprisonment for any time he has *spent in official detention* prior to the date the sentence commences—
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

(emphasis added). The relevant question is whether "official detention" includes a court order of confinement in a facility such as a halfway house as a condition of bail.

A.

Prior to 1960, sentencing courts gave credit toward the sentence imposed for time spent in pre-

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[1] In the district court, Koray also argued that the statute violated equal protection by treating pre-trial defendants differently than post-sentenced defendants. The district court rejected this argument. Koray does not raise his equal protection argument on appeal, and we do not address it.

sentence custody. *See Soyka v. Alldredge*, 481 F.2d 303, 305 & n.6 (3d Cir. 1973). However, courts lacked authority to give such credit to a defendant sentenced to a statutory mandatory minimum, *see Stapf v. United States*, 367 F.2d 326, 328 (D.C. Cir. 1966), and the number of such statutes markedly increased. To avoid the disparity between those sentenced under a mandatory minimum and those who were not, and also between those granted bail and those who were not, Congress amended the statute in 1960 to grant credit for pre-sentence confinement. Codified at 18 U.S.C. § 3568, the provision required that "the Attorney General shall give any [person convicted] credit toward service of his sentence for any days spent in custody prior to the imposition of sentence by the sentencing court for want of bail set for the offense under which sentence was imposed where the statute requires the imposition of a minimum mandatory sentence." Pub. L. No. 86-691, § 1 (a), 74 Stat. 738, 738 (1960).

This provision was amended in 1966 to expand the credit provisions, removing the requirement that credit only be granted in cases of mandatory minimums, increasing the offenses which could be counted for credit, and removing any mention of bail. It required that the "Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." Pub. L. No. 89-465, § 4, 80 Stat. 214, 217 (1966) (codified at 18 U.S.C. § 3568 (1982)).

In the Sentencing Reform Act of 1984, Congress rewrote section 3568 and recodified it as section 3585 (b). *See* Pub. L. No. 98-473, 98 Stat. 1998, 2001 (1984). "Congress entirely rewrote § 3568 when it

changed it to its present form in § 3585(b). It rearranged its clauses, rephrased its central idea in the passive voice, and more than doubled its length." *United States v. Wilson*, 112 S. Ct. 1351, 1355 (1992). "Congress altered § 3568 in at least three ways when it enacted § 3585(b). First, Congress replaced the term 'custody' with the term 'official detention.' Second, Congress made clear that a defendant could not receive a double credit for his detention time. Third, Congress enlarged the class of defendants eligible to receive credit." *Id.* at 1355-56.

B.

We have had few opportunities to consider the scope of either section 3585 or its predecessor. This court recently declined to decide the question presently before us because the defendant had not exhausted his administrative remedies. *See United States v. Brann*, 990 F.2d 98, 103-04 (3d Cir. 1993).

The only prior decision in which this court spoke to the issue of credit for time outside of prison was *United States v. Golden*, 795 F.2d 19 (3d Cir. 1986), which concerned time spent in the Federal Witness Protection Program rather than in a halfway house. In *Golden*, the defendant entered into an agreement to plead guilty to two lesser counts and to assist the government in its investigation and prosecution of drug-related crimes. The government agreed to place him in the Federal Witness Protection Program. The district court sentenced the defendant to eight years and ordered "that the defendant is permitted to self-report at such time and place when notified by the United States Marshal's Office." *Id.* at 20 (quotation omitted). The defendant then remained at large in

the Witness Protection Program until the Marshal ordered him to report to prison twenty-one months later. Defendant appealed, claiming that the sentence was illegal because the district court failed to specify when it would begin. We agreed, and remanded for resentencing.

We rejected the defendant's claim that he was entitled as a matter of law to credit for the time he spent in the Witness Protection Program, stating "[g]enerally, a defendant is not entitled to credit for time spent released on his own recognizance prior to entering prison." *Id.* at 21. Therefore, we rejected the defendant's contention that failure to credit his sentence for time spent in the Witness Protection Program was a breach of the plea agreement, stating:

> The plea agreement specifically provided that he would be given credit for periods of incarceration prior to sentencing. By statute, credit for time prior to commencement of the sentence is given for time spent in custody. However, custody has been defined as actual incarceration. *See United States v. Ortega*, 510 F.2d 412 (10th Cir. 1975). While restrictions were placed on [the defendant], the district court was not required to equate his life in the Witness Protection Program with incarceration.

*Id.*

On the other hand, we suggested that the issue of credit was one for the discretion of the district court, stating that on resentencing the district court "may determine that [defendant] is entitled to a credit for some portion of the twenty-one months between the time [he] was sentenced and the time he was actually ordered to report to prison." *Id.* Thus, we

may have been suggesting that some of the time the defendant was in the Witness Protection Program was more restrictive than mere recognizance and therefore could be entitled to credit.

Finally, although not directly on point, we considered the issue of comparability between prison and a halfway house in *United States v. Parker*, 902 F.2d 221 (3d Cir. 1990). Defendant appealed from his sentence of six months of confinement in a community facility on the ground that it did not represent a departure as recommended by the government because six months in the community center was equivalent to the minimum sentence under the guidelines. We disagreed, stating, "[w]e think it clear that a period of confinement as a condition of probation, subject to a defendant's being released to go to work, cannot possibly be equated with an equivalent period of imprisonment." *Id.* at 222. *Parker* presents less assistance than *Golden*, and *Golden* is itself not directly relevant because of the marked fact difference.

C.

The other Courts of Appeals to have considered this issue are divided. Although most have concluded that section 3585, like its predecessor section 3568, does not require the Bureau to credit presentenced defendants whose bail conditions allowed them to be confined outside of Bureau of Prison facilities, that conclusion was not reached without dissent. *See, e.g.*, *Moreland v. United States*, 968 F.2d 655, 659-60 (8th Cir.) (en banc) (plurality) (with one judge concurring in judgment and five judges dissenting), *cert. denied*, 113 S. Ct. 675 (1992); *United States v. Becak*, 954 F.2d 386, 387-88 (6th Cir.), *cert. de-*

*nied*, 112 S. Ct. 2286 (1992); *Spinola v. United States*, 941 F.2d 1528, 1529 (11th Cir. 1991); *Randall v. Whelan*, 938 F.2d 522, 525 (4th Cir. 1991) (with Butzner, J., dissenting); *United States v. Insley*, 927 F.2d 185, 186 (4th Cir. 1991); *United States v. Woods*, 888 F.2d 653, 655-56 (10th Cir. 1989), *cert. denied*, 494 U.S. 1006 (1990); *Ramsey v. Brennan*, 878 F.2d 995, 996 (7th Cir. 1989); *United States v. Smith*, 869 F.2d 835, 837 (5th Cir. 1989); *United States v. Figueroa*, 828 F.2d 70, 71 (1st Cir. 1987) (per curiam); *see also United States v. Westmoreland*, 974 F.2d 736, 740-45 (6th Cir. 1992) (Engel, J., dissenting), *cert. denied*, 113 S. Ct. 1818 (1993). In addition, the Ninth Circuit has rejected the conclusion reached by the other circuits, holding instead that when conditions of release approach those of incarceration, a detainee is in "official detention" for purposes of section 3585. *See Fraley v. United States Bureau of Prisons*, 1 F.3d 924, 925-26 (9th Cir. 1993); *Lahey v. Floyd*, 992 F.2d 234, 235-36 (9th Cir. 1993); *Mills v. Taylor*, 967 F.2d 1397, 1400-01 (9th Cir. 1992); *Grady v. Crabtree*, 958 F.2d 874, 875 (9th Cir. 1992) (per curiam); *Brown v. Rison*, 895 F.2d 533, 536 (9th Cir. 1990).

In reaching the decision that no credit should be awarded, some of the courts have deferred to the interpretation of the statute used by the Bureau of Prisons. *See Moreland*, 968 F.2d at 658; *Randall*, 938 F.2d at 525 & n.3; *Ramsey*, 878 F.2d at 996 (Bureau's interpretation "is a reasonable opinion by officials having greater knowledge of federal penal policy than we judges have, so we are inclined to defer to it.").

It is far from clear that the Bureau of Prisons' determination that section 3585 does not require credit be granted when a court "releases" a presentenced defendant to a halfway house should be granted the substantial deference that *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires to be given to an agency's own interpretation of the statute it administers. The Bureau's interpretation is recorded in its "Program Statements," which are merely internal agency guidelines and may be altered by the Bureau at will. *See* Bureau of Prisons, Program Statement 1221.02.1.2.1 (Apr. 12, 1993) (describing how Program Statements are promulgated and modified). As such, it is entitled to a lesser level of deference from the courts than are published regulations subject to the rigors of the Administrative Procedures Act, including public notice and comment. *See FLRA v. United States Dep't of Navy*, 966 F.2d 747, 762 & n.14 (3d Cir. 1992) (in banc); *Marshall v. Rosemont, Inc.*, 584 F.2d 319, 321 (9th Cir. 1978).

Even when we accord the Bureau's interpretation some level of deference, we must examine whether the Bureau engaged in the necessary "reasoned analysis" of this issue. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 42 (1983) (revision of regulations requires "reasoned analysis"). In that connection, it is difficult to ignore the fact that the rationale given by the Bureau for its refusal to accord credit for time spent by a pretrial detainee in a halfway house is different under section 3568 than it is under the currently applicable section 3585. When interpreting section 3568, the Bureau rationalized its decision not to ac-

cord credit on the basis of the degree of restraint. Thus it distinguished between "[t]ime spent in residence in a *residential community center*" where "the degree of restraint . . . is not sufficient restraint to constitute custody" and "time spent in a *jail-type* facility . . . as a condition of bail or bond" which was "creditable as jail time because of the greater degree of restraint." Bureau of Prisons, Program Statement No. 5880.24(5)(b)(5) (Sept. 5, 1979), *quoted in Johnson v. Smith*, 696 F.2d 1334, 1336 (11th Cir. 1983).

Although the Bureau still retains this functional analysis for defendants governed by section 3568, *see* Bureau of Prisons, Program Statement 5880.30(7)(b)(5) (July 16, 1993), it uses a different approach for section 3585. Now it focuses on whether the defendant has been "released" to pretrial services or "detained" by the Attorney General. *See* 18 U.S.C. § 3141(a) (1988) ("A judicial officer authorized to order the arrest of a person under section 3041 of this title before whom an arrested person is brought shall order that such person be released or detained, pending judicial proceedings, under this chapter.").

The Program's current position is that "[t]ime spent in residence in a community corrections center as a result of the Pretrial Services Act of 1982 (18 U.S.C. § 3152-3154), or as a result of a condition of bail or bond (18 U.S.C. § 3141-3143), is not creditable as presentence time." Bureau of Prisons, Program Statement 5880.28(c) (Feb. 21, 1992). It has determined that "[a] condition of bail or bond which is 'highly restrictive,' and that includes 'house arrest', 'electronic monitoring' or 'home confinement'; or such as requiring the defendant to report daily to

the U.S. Marshal, U.S. Probation Service, or other person; is not considered as time in official detention." *Id.* The rationale given by the Bureau is that "[s]uch a defendant is not subject to the discretion of the U.S. Attorney General, the Bureau of Prisons, or the U.S. Marshals Service, regarding participation, placement, or subsequent return to a more secure environment, and therefore is not in a status which would indicate an award of credit is appropriate." *Id.* The Bureau also believes that "the government may not prosecute for escape in the case of an unauthorized absence in such cases, as the person has been lawfully *released* from 'official detention.' " *Id.*

The distinction in approaches is highly significant for Koray. Under the earlier rationale he might be able to convince the Bureau or a court that his conditions of confinement in the Volunteers of America facility were similar to those in a "jail-type facility" and that credit was appropriate notwithstanding the Bureau's generally applicable rule denying credit for time spent in a halfway house. Under the current rationale, Koray would not have that opportunity because he is clearly in the custody of pretrial services rather than the Attorney General.

In order to determine whether the Bureau's interpretation withstands "reasoned analysis" we must examine whether the intervening statutory change from "custody" to "official detention" can carry the weight of this new interpretation. The legislative history of the change is both lengthy and unenlightening. While we describe it in the margin, we note that Congress has used the terms "custody," "official custody," "confinement" and "official detention" interchangeably in describing this provision, as would

a normal English speaker.[2] Indeed, the title of the subsection remains "Credit for Prior *Custody*." (emphasis added). *See INS v. National Ctr. for Immi-*

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[2] The "official detention" language now codified at § 3585 was originally introduced in the 93rd Congress in S. 1, which was a comprehensive effort to revise Title 18 of the United States Code. *See* S. 1, 93d Cong., 1st Sess. (1973). That language remained when the version of the bill was reported out of the Judiciary Committee in the 94th Congress. *See* S. 1, 94th Cong., 1st Sess. (1975). In the only discussion of this section, the Judiciary Committee's Report described the then present federal law, which was § 3568, as providing "that the offender will receive credit for any time spent in custody" and described the proposed language as providing "credit towards the sentence of imprisonment for any time the defendant has spent in *official custody* prior to the date the sentence was imposed." S. Rep. No. 00, 94th Cong., 2d Sess. 926-27 (1976) (emphasis added). The same language of the bill continued throughout revisions in the 95th, 96th and 97th Congress as S. 1437, S. 1722, and S. 1630 respectively. *See* S. 1437, 95th Cong., 1st Sess. (1977); S. 1437, 95th Cong., 2nd Sess. (1978); S. 1722, 96th Cong., 1st Sess. (1979); S. 1630, 97th Cong., 1st Sess. (1981). Moreover, the Judiciary Committee's Report used the same descriptive language concerning this provision each time. *See* S. Rep. No. 605, 95th Cong., 1st Sess. 935-36 (1977); S. Rep. No. 553, 96th Cong., 2d Sess. 996 (1980); S. Rep. No. 307, 97th Cong., 1st Sess. 1049 (1981). Finally, in the 98th Congress, the provision was included in two bills. S. 668 and S. 1762. The Senate Judiciary Committee reported out both these bills with the exact same description of the provision. S. Rep. No. 223, 98th Cong., 1st Sess. 125-26 (1983); S. Rep. No. 225, 98th Cong., 1st Sess. 128-29 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3311-12. The Senate passed S. 1762.

Meanwhile, the House Judiciary Committee which reported out H.R. 6915 tracking the language of the previous Senate bills described the provision as providing "a defendant be given credit toward the service of a term of imprisonment

*grants' Rights, Inc.*, 112 S.Ct. 551, 556 (1991) (may use title to construe statute).

From this we conclude, as have all the circuits which have considered the issue, that the use of the word "official detention" rather than the word "custody" was not intended to alter the meaning of the statute. *See Moreland*, 968 F.2d at 657-58 n.6 (plurality); *id.* at 664 (Heaney, J., dissenting); *Mills*, 967 F.2d at 1400; *United States v. Edwards*, 960 F.2d 278, 283 (2d Cir. 1992); *Pinedo v. United States*, 955 F.2d 12, 14 (5th Cir. 1992); *Becak*, 954 F.2d at 387-88; *Insley*, 927 F.2d at 186; *Woods*, 888 F.2d at 655.

It follows that before we accord any substantial deference to the Bureau, we must look to whether the Bureau has articulated any sustainable rationale for reading "official detention" as if it provided "official detention *by the Attorney General or the Bureau of Prisons.*" The plain meaning of the words "offi-

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for any time spent in *confinement* before the commencement of the sentence of imprisonment if that time has not been credited against another sentence." H.R. Rep. No. 1396, 96th Cong., 2d Sess. 474 (1980) (emphasis added). In the 98th Congress, the House Judiciary Committee, while rejecting much of what was in S. 1762, proposed its own crime bill which incorporated a provision similar to the Senate's credit provision except that it provided that a "defendant shall be given credit toward the service of a term of imprisonment for any time spent in *custody* before the date on which the term commences." H.R. 6012, 98th Cong., 2d Sess. (1984) (emphasis added). The Judiciary Committee reported that this provision required credit be given for "any time spent in *confinement* before the commencement of the sentence of imprisonment." H.R. Rep. No. 1017, 98th Cong., 2nd Sess. 54 (1984) (emphasis added). The House passed the Senate's version without any changes to the credit provision.

cial detention" does not require this result; there is nothing in the statute which requires or suggests that a defendant must be under the detention of the Bureau. *But see Randall*, 938 F.2d at 525 ("There exists a strong presumption that 'custody' refers to the legal authority of the custodian rather than to actual housing conditions."). A court may "detain" a person as "official[ly]" as the Attorney General. *Cf. United States v. Camarata*, 828 F.2d 974, 981 (3d Cir. 1987) (Becker, J., concurring) (defendant on bail "was under the custody of the court, not the Attorney General"), *cert. denied*, 484 U.S. 1069 (1988).

It is therefore difficult to view Koray's detention as other than "official" since he was put in the "custody" of pretrial services, 18 U.S.C. § 3142(c)(1)(B)(i), and was confined to the halfway house by court order. Although the Bureau notes that only an escape from one of its facilities permits prosecution as an escape from confinement under 18 U.S.C. § 751(a), *see United States v. Baxley*, 982 F.2d 1265, 1269-70 (9th Cir. 1992); *United States v. Miranda*, 749 F. Supp. 1062, 1063-64 (D. Colo. 1990); *but cf. Ramsey*, 878 F.2d at 996 (dicta), this does not mean that escape from the Volunteers of America facility would have gone unpunished. In fact, Koray's failure to comply with the conditions of his release would be a felony and would have subjected him to what the Bureau concedes is "a more severe punishment." Appellee's Br. at 15 n.5; *see* 18 U.S.C. §§ 3146(b), 3148(a) (1988); *United States v. George*, 625 F.2d 1081, 1084-85 (3d Cir. 1980) (failing to report to U.S. Marshal as required by condition of bail is a felony under the Bail Reform Act).

Moreover, the Bureau itself does not always limit "official detention" to that served under the custody

of the Attorney General. In this connection we note that the Bureau has characterized other custody as "constructive federal custody" and has been willing to give presentenced defendants credit under section 3585 and its predecessor section 3568 for certain time spent in state facilities, even though the defendant was not in the Attorney General's custody. *See, e.g.*, Bureau of Prison, Program Statement 5880.28 (c)(1)(a)(2),[3] 5880.28(c)(1)(b)[4] (Feb. 21, 1992);

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[3] Under the Program Statement cited in the text, credit will not be given for any portion of time spent serving another sentence regardless of whether the sentence is federal, state, or foreign, *except as follows*:

> *a.* Time spent serving another foreign or state sentence that is vacated may be creditable as prior custody time credit provided the sentence was not vacated merely for resentencing. Any such time which is credited must be time spent after the commission of the federal offense. If a vacated state or foreign sentence results in a retrial and subsequent resentencing, any credit applied to that resentencing must be removed from the federal sentence computation, provided the inmate has not yet been released from that sentence.
>
> *b.* Time spent serving another federal, foreign or state sentence that is vacated merely for resentencing shall not have any effect on the [Sentencing Reform Act (SRA)] sentence computation until such time as the inmate is resentenced. If the resentencing results in a term which is less than the time the inmate has already served on the vacated sentence, the excess time not now credited to any other sentence shall be credited to the SRA term provided it was time spent after the commission of the federal offense.

[4] Under another section, credit related to 18 U.S.C. § 3585(b)(2) will be given as follows:

> *1.* Prior Custody Credit will be given for time spent in official detention as the result of any federal, state or

foreign arrest which is not related to, yet occurred on or after the date of commission of the federal offense for which the SRA sentence was imposed; provided it has not been credited to another sentence. The language in this Section eliminates any need for a federal detainer to be on file or for bail to be set on the state or foreign charges as a prerequisite for applying such presentence time credit toward the federal sentence. Relevant prerequisites are:

*a.* The non-related official detention must have occurred on or after the *date* of the federal offense for which the SRA sentence was imposed.

*b.* The non-related official detention must not have been granted on another sentence. If it was applied on a state or foreign sentence, then credit is not applicable to the SRA sentence.

*2.* Failure by the state to grant official detention credit on a state sentence can be determined if:

*a.* The state charges are dismissed.

*b.* State probation is granted.

*c.* The federal term is concurrent with the state term and the Full Term Date of the state term is absorbed within the Full Term Date of the federal sentence (prior to applying any presentence credits and regardless of any award of prior custody credits by the state). Prior custody credits would be given up to the date that the first sentence begins to run, federal or state. Credit may *not* be applied for any time spent prior to the date of the SRA offense. Further, if the release from the non-federal sentence occurs prior to the imposition of the federal sentence, then any non-federal prior custody time awarded on the state sentence may *not* be applied to the federal sentence.

*d.* The state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's credit . . . .

*e.* Ordinarily, if a state sentence is served, the inmate will have received credit for the presentence

*id.* at 5880.30(7)(c)(1) (July 16, 1993);[5] *see also Moreland*, 968 F.2d at 660 n.10.

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official detention. However, if it can be demonstrated that the state did not credit the time, the credit will be awarded for time in state custody consistent with the instructions set forth in this section.

(table omitted).

[5] This section, entitled "constructive federal custody," applies to defendants still governed by section 3568 as follows:

(1) For time in non-federal custody when the non-federal custody is based on charges that later resulted in a federal sentence.

(a) Credit shall be given for all time spent in non-federal or foreign custody when the underlying basis for custody in fact is a federal warrant. For example, if a federal warrant is issued and the defendant is arrested by county police or foreign officials on the basis of the federal warrant, credit shall be given from the date of arrest to the date of sentence for all days in custody. Inquiries or requests for foreign presentence time credit, along with copies of the judgment and commitment and copies of any documentation in the institution or in the possession of the prisoner, must be sent to the Chief of Inmate Systems Management for verification.

(b) If the federal defendant has been in presentence state or foreign custody on essentially the same charges, credit shall also be given even though a federal detainer may not have been on file during that time. Credit shall also be given for time spent in non-federal presentence custody when the non-federal and federal charges are similar enough to be considered the same criminal act or offense. This non-federal presentence custody is applicable when the factors of time, location, and the criminal acts are identical in both charges. Credit shall also be given for all time spent serving a state sentence (on

It follows from the anomalous result proffered by the Bureau and the absence of any support therefor in the statute or legislative history that the deference which we must accord it is minimal. *See Mills*, 967 F.2d at 1400 ("BOP's interpretation of section 3585 is unreasonable"); *Brown*, 895 F.2d at 536 ("we cannot accept as reasonable a definition of 'custody' that excludes enforced residence under conditions approaching those of incarceration; to do so would be contrary to the considerations of fairness that must have underlain Congress's provision of credit for time served").

After all, it is the statutory language we must construe. "To a normal English speaker, even to a legal English speaker, being forced to live in a halfway house is to be held 'in custody' . . . "*Ramsey*, 878 F.2d at 996; *see also Brown*, 895 F.2d at 536. The "ordinary and obvious meaning of [a] phrase is not to be lightly discounted." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). Such an understanding of "custody" has also been articulated by organizations involved in defining the standards in the field. *See* 3 American Bar Association, *Standards for Criminal Justice* 18-319 (2d ed. 1980) (should grant credit for time spent in "custody," including any bail program which "imposes substantial restrictions on the offender's freedom of activity"); National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* § 5.8 comment. (1973) ("In some cases . . . conditions for pre-trial release are substantial and involve serious restrictions on liberty. Where

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**the same charges as defined in this paragraph), which has its conviction vacated with no further prosecution to follow, in addition to any other non-federal presentence time.**

supervision is substantial, courts should be authorized to grant a measure of credit for such time against the sentence imposed.").

Notwithstanding the latter, we are not prepared to open the floodgates of credit by viewing "official detention" as encompassing the vast array of alternative sentencing mechanisms which are currently used in the federal system to confine and rehabilitate accused and convicted defendants. Instead, we find ourselves persuaded by the comments of Judge Heaney, for the five dissenters in *Moreland*: "Under the statute, the degree of confinement is what is at issue . . . . Moreover, . . . the restrictions on [the defendant's] liberty were among the most severe that could have been imposed as a condition of pretrial release. The government placed [the defendant] into a halfway house not only to ensure his appearance at trial but also to protect the community, a goal that is perhaps the central purpose of incarceration today." *Moreland*, 968 F.2d at 666-67.

Although the Bureau of Prisons maintains its position that "conditions at community treatment centers *generally* are neither penal in nature nor nearly as restrictive as those in a full custodial environment," Appellee's Br. at 9 (emphasis added), it does not argue that the release conditions imposed on Koray are not equal to the restrictions imposed on some defendants in the custody of the Bureau who do receive credit against their sentence. While the district court did not make factual findings regarding the conditions of confinement at the Volunteers of America facility, according to the allegations in Koray's motion in the district court (unchallenged by the Bureau), he was subjected to substantial restrictions on his liberty: he was permitted to leave

the facility only once in 150 days (for a medical exam), he had to account for his presence five times a day, he was subject to random breath and urine tests, his access to visitors was limited in both time and manner, and there was a paucity of vocational, educational, and recreational services compared to a prison facility. In its brief, the Bureau admits that "the Volunteers of America maintains a halfway house similar to the manner in which the Bureau of Prisons may also operate such facilities." Appellee's Br. at 14.

The Bureau would preclude any factual determination of whether a prisoner was held under jail-type conditions, arguing that a bright-line rule is necessary in light of the fact-specific nature any alternative would require. Some courts have agreed. *See Randall v. Whelan*, 938 F.2d 522, 525 (4th Cir. 1991) (broader definition of custody "would mire the judiciary in a swamp of factual and circumstantial details that would likely produce inconsistent and standardless decisions"); *Moreland*, 968 F.2d at 663 (Loken, J., concurring in judgment). It is significant, however, that the facts in many of the cases which appear to support a broad rule giving credit for time in a halfway house were markedly different than these here, and those defendants would not have been entitled to credit under the criterion of "jail-type detention." For example, defendants in *Becak*, 954 F.2d at 387; *Insley*, 927 F.2d at 186; and *Spinola*, 941 F.2d at 1529, all were residing with one or more parent; the defendant in *Woods* was in a halfway house with work release, 888 F.2d at 654; and the custodial conditions in some of the other cases are unclear but appeared to permit daytime release.

Similarly, the cases relied upon by the Bureau from other courts which have refused to grant credit because the conditions imposed were not substantial enough to be equivalent to imprisonment are inapposite to this case. *See, e.g., United States v. Zackular*, 945 F.2d 423, 425 (1st Cir. 1991) ("confinement to the comfort of one's own home is not the functional equivalent of incarceration in either a practical or a psychological sense"); *United States v. Edwards*, 960 F.2d 278, 282-85 (2d Cir. 1992) (confinement to uncle's apartment except for religious services, choir practice, court appearances and to meet with attorney with intermittent electronic monitoring is insufficient to constitue "official detention"); *Marrera v. Edwards*, 812 F.2d 1517, 1517 (6th Cir. 1987) (pretrial confinement for medical treatment not "custody"); *United States v. Robles*, 563 F.2d 1308, 1309 (9th Cir. 1977) (defendant released on recognizance with minimal restrictions not in "custody"), *cert. denied*, 435 U.S. 925 (1978); *United States v. Peterson*, 507 F.2d 1191, 1192 (D.C. Cir. 1974) (defendant "at large on conditional release" not in "custody"); *cf. United States v. Parker*, 902 F.2d 221, 222 (3d Cir. 1990) ("a period of confinement as a condition of probation, *subject to a defendant's being released to go to work*, cannot possibly be equated with an equivalent period of imprisonment" (emphasis added)).

We therefore do not believe it will be administratively difficult to give credit for time served by defendants under jail-type detention. The overwhelming majority of defendants will not be affected since only a small percentage of federal defendants are released to a halfway house. We also note that the Bureau was able to incorporate the Ninth Circuit's de-

cision into its Program Statement,[6] and there is no allegation, much less evidence, that this overwhelmed the Bureau's administrative process.

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[6] The Program Statement accommodates the Ninth Circuit's decision in *Brown* by providing as to defendants governed by section 3568 that:

> An exception to the rule, contained in paragraph 7.b.(5) above, pertains to any person sentenced in the Ninth Circuit, regardless of where that person is presently located or may transfer, who was ordered to spend time in a halfway house as a condition of bond, if that condition required that the person spend the night in the halfway house. (If the person worked nights and was ordered to spend off duty hours in the halfway house, then such off duty hours would be considered "nights" for crediting purposes.) For this particular group of defendants, credit must be given for each presentence day spent in the halfway house. (See *Brown* v. *Rison*, 895 F.2d 533 (9th Cir. 1990).
>
> Regardless of whether a person is presently confined, or is received in the future, records need not be reviewed until the person requests *Brown* credit. Exhaustion of administrative remedy is not required. Credit may be requested on a request to staff member form. Credit will only be given when the person can provide evidence, e.g., name or pretrial services officer, name and location of the halfway house, and dates of "custody" in the halfway house, to support the claim that such credit exists.
>
> Based on the information provided by the prisoner, staff are responsible for obtaining necessary documentation to substantiate the claim before *Brown* credit may be given. If information is received from some source other than the prisoner that *Brown* credit may apply, of if it is obvious that such credit may apply, then staff shall initiate an inquiry by interviewing the prisoner involved.

Bureau of Prisons, Program Statement 5880.30(7)(b)(6) (July 16, 1993).

Moreover, we note the inherent unfairness in declining to grant credit to a defendant who sought bail but was confined under jail-like conditions without giving the defendant notice that this would be the result. Some defendants, such as Koray, might choose not to request bail under these circumstances, particularly if the alternative is "official detention" in a minimum-security type institution with facilites superior to those in the halfway house in question. Further, we cannot ignore that the government derives the full benefits of incarceration, protecting the public and ensuring the defendant's presence at trial at a lower cost while freeing scarce jail space for truly dangerous offenders. *See* Garry A. Berger, *Pre-Sentence Halfway House Residents: Are They Entitled to Credit Toward Subsequent Prison Sentences?*, 27 Colum. J.L. & Soc. Probs. 191, 194 n.11 (1993).

After careful consideration of the decisions of all the other courts to have ruled on the issue and the position of the Bureau of Prisons, we conclude that "official detention" for purposes of credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement. While we do not go as far as does the Ninth Circuit which appears to authorize credit for confinement under somewhat less restrictive conditions, we believe the standard we establish is consistent with the language of the statute, Congress's intent, and the Burau's initial rationale under the statute. We are confident that the district courts will have no difficulty in applying this test in the few situations we anticipate will arise. To assist the district courts, we explain this does not include confinement in drug rehabilitation facilities, where the defendant is receiving the benefit of the confinement, nor of course any halfway house where defendant

leaves to work during part of the day. Because there has been no finding that Koray was in fact held under such conditions, we will remand for the necessary fact finding.

III.

We will reverse the order of the district court and remand for further proceedings consistent with this opinion. The district court should conduct those proceedings with expedition, because the time that Koray must serve in prison will have expired if he is entitled to credit for the time he was confined in the Volunteers of America facility.[1] The mandate shall issue forthwith.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[1] We leave it to the discretion of the district court whether, under the circumstances, Koray should be released pending such a hearing.

**APPENDIX B**

[Filed Apr. 30, 1993]

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

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Civil No. 3:CV-92-1458
(Judge Kosik)

ZIYA K. KORAY, PETITIONER

*v.*

FRANK SIZER, ET AL., RESPONDENTS

---

ORDER

This is a petition for a writ of habeas corpus filed under 28 U.S.C. § 2241 by Ziya Koray, an inmate at the Allenwood Federal Prison Camp, Montgomery Pennsylvania ("Allenwood"). Koray seeks an order directing the Bureau of Prisons to recompute his federal sentence to include sentence credit for time spent confined in a halfway house as a condition of bail. For the following reasons, the petition will be denied.

The facts are essentially undisputed. On April 23, 1991, Koray was arrested for laundering monetary instruments in violation of 18 U.S.C. § 1956(a)(1). He was released on bail with conditions under the Bail Reform Act on June 25, 1991. *See* 18 U.S.C. § 3142(c). Conditions of Koray's bail included the

requirement that he remain at a halfway house 24 hours per day unless accompanied by a special agent or authorized to leave by court order. Koray was convicted and sentenced on October 22, 1991, but permitted to remain under conditional release until November 25, 1991. On that date, Koray reported to Allenwood for service of his federal sentence.

By way of this petition, Koray seeks sentence credit for the time he spent confined in the halfway house between June 26, 1991 and November 24, 1991, alleging that the restrictive conditions of bail amounted to "official detention" under 18 U.S.C. § 3585.[1] Koray also argues that it violates equal protection to deny him sentence credit but to grant such credit for prisoners serving their federal sentences at halfway houses.

Though the Court of Appeals of the Third Circuit has yet to confront either argument, the monumental weight of authority counsels against granting the petition. *See United States v. Zackular*, 945 F.2d 423 (1st Cir. 1991) (official detention requirement of section 3585 can not be fulfilled by home confinement); *United States v. Edwards*, 960 F.2d 278 (2d Cir.

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[1] Section 3585 provides that

> A defendant shall be given credit towards the sentence of a term of imprisonment for any time spent in official detention prior to the date the sentence commences
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

18 U.S.C. § 3585(b).

1992) (defendant released on bail subject to house arrest and electronic monitoring not entitled to sentencing credit for time spent on bail; no equal protection violation); *Tinsley v. Attorney General*, 806 F.Supp. 31 (S.D.N.Y. 1992) (time spent released on bond pending trial or sentence not time spent in "official detention" under § 3585(b)); *Randall v. Whelan*, 938 F.2d 522 (4th Cir. 1991) (defendant on bail in drug rehabilitation center at all times except for court appearances and meetings with counsel not entitled to sentence credit); *United States v. Insley*, 927 F.2d 185 (4th Cir. 1991) (restrictive conditions of bail including curfew and electronic monitoring do not constitute official detention under § 3585); *Starchild v. Federal Bureau of Prisons*, 973 F.2d 610 (8th Cir. 1992) (petitioner on bond under house arrest, not allowed to leave house except to go to probation office or court, and responsible custodians required to be with petitioner 24 hours per day prior to sentencing —sentence credit denied); *Moreland v. United States*, 968 F.2d 655 (8th Cir. 1992) (only time spent in jail-type facility creditable as jail time and halfway house is not a jail-type facility; no violation of equal protection); *United States v. Wickman*, 955 F.2d 592 (8th Cir. 1992) (house arrest is not official detention within the meaning of § 3585); *United States v. Woods*, 888 F.2d 653, 655 (10th Cir. 1989) (time spent on bond in residential treatment center prior to commencement of sentence not creditable; no equal protection violation). We fall in line with the many courts that have held restrictive bail conditions do not amount to official detention under § 3585. *See United States v. Parker*, 902 F.2d 221, 222 (3d Cir. 1990) (confinement at community corrections center subject to work release as condition of probation

"cannot possibly be equated with an equivalent period of imprisonment"). We also accept the argument that there is no violation of equal protection under the circumstances because the two revelant classes (pre-sentence detainees and duly sentenced prisoners) are not similarly situated.

NOW, THEREFORE, THIS 30th DAY OF APRIL, 1993, IT IS HEREBY ORDERED THAT:

1. The petition for a writ of habeas corpus is denied.
2. The Clerk of Court is directed to close this file.
3. Any appeal from this decision will be deemed frivolous, not taken in good faith, and lacking probable cause.

/s/ Edwin M. Kosik
EDWIN M. KOSIK
United States District Judge

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 93-7357

ZIYA K. KORAY, APPELLANT

*v.*

FRANK SIZER;
UNITED STATES BUREAU OF PRISONS;
ATTORNEY GENERAL OF THE UNITED STATES

---

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and LEWIS, *Circuit Judges*

The petition for rehearing filed by *Appellees*, FRANK SIZER; UNITED STATES BUREAU OF PRISONS; ATTORNEY GENERAL OF THE UNITED STATES in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having

asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ D. K. Sloviter
Chief Judge

Dated: Jun. 17, 1994

**APPENDIX D**

SUPREME COURT OF THE UNITED STATES

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No. A-166

FRANK SIZER, Warden, PETITIONER

*v.*

ZIYA KORAY

---

ORDER

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UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 15th, 1994.

/s/ David H. Souter
Associate Justice of the Supreme
Court of the United States

Dated this 8th day of September, 1994.

**APPENDIX E**

SUPREME COURT OF THE UNITED STATES

---

No. A-166

FRANK SIZER, Warden, PETITIONER

*v.*

ZIYA KORAY

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ORDER

---

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended further to and including November 1st, 1994.

/s/ David H. Souter
Associate Justice of the Supreme
Court of the United States

Dated this 11th day of October, 1994.

**APPENDIX F**

U.S. Department of Justice
Federal Prison System

*Washington, D.C. 20534*

| | |
|---|---|
| OPI | : MISB |
| Number | : 5880.24 |
| Date | : September 5, 1979 |
| Subject | : Sentence Computation, Jail Time Credit Under 18 USC 3568 |

Program Statement

1. *PURPOSE.* To establish the procedures to be followed for making jail-time credit determinations.

2. *DIRECTIVES AFFECTED.* PS 5880.19, *Credit for Time in Custody Under 18 USC 3568*, (5-27-75), is superseded.

3. *BACKGROUND.* Prior to October 2, 1960, credit for time in custody before sentencing was left to the discretion of the sentencing court. The presumption was that the sentencing judge would take the amount of time spent in custody prior to sentencing into consideration at the time sentence was imposed. This first crediting statute (P. L. 86-691, an amendment to 18 USC 3568) granted credit on minimum-mandatory sentences. These were primarily the sentences imposed under the Harrison Narcotic Act of 1956.

Judicial decisions later extended jail credit for those sentenced to the maximum sentence for violation of any statute, on the presumption that the sentencing

court did not take the amount of jail time into consideration at the time of sentencing. As policy, this applied only to those sentenced after the effective date (October 2, 1960) of P. L. 86-691.

The passage of the Bail Reform Act of 1966 (P. L. 89-465) further expanded the credit to be given under 18 USC 3568 to all persons sentenced on and after the effective date of the Act (September 20, 1966). The language of the Act required credit for all time in custody in connection with the federal offense. Case law confirmed the application of the Act to YCA, FJDA, and NARA sentences. Courts also expanded federal jail credit to include periods of custody wherein the primary custody was with a non-federal agency. Credit was held to be applicable on any subsequent federal term of confinement because of the effect the federal charges (through a warrant or detainer) had on the non-federal custody.

4. *STATUTORY AUTHORITY.* Jail time credit is controlled by 18 USC 3568, which states "The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or act for which sentence was imposed."

5. *POLICY.* "In custody" is defined, for purposes of this program statement, as *physical* incarceration in a jail-type institution or facility. It does not include all time that may be considered custody for habeas corpus jurisdiction purposes, for example in the case of *Hensley v. Municipal Court*, 411 U. S. 345 (1973) (See *Cochran* v. *U. S.*, 489 F.2d 691 (C.A. 5, 1974)).

Any part of a day spent in custody equals one day for credit purposes. Credit will be applied in the following manner for the following situations:

a. Sentences imposed prior to September 20, 1966.

Jail time credit will be applied 1.) to those sentences in which the maximum penalty was imposed, 2.) if the penalty of imprisonment added to the number of days in presentencing custody exceeds the maximum for the offense, or 3.) if the violation required the imposition of a minimum-mandatory penalty, and if the criteria in paragraph 5.b. are met.

(1) To determine if the maximum sentence was imposed, refer to the penalty provisions of the sections violated in the appropriate Title of the U. S. Code. If the sentence imposed represents the aggregation of terms on more than one count, jail time credit will be applied to the applicable count, prior to aggregating the terms.

(2) If a sentence is less than the maximum, but adding the sentence to the number of jail days exceeds the maximum for the offense, then jail time credit will be applicable for the number of days that caused the maximum for the offense to be exceeded.

(3) On a sentence imposed for an offense requiring the imposition of a minimum-mandatory penalty, the sentence imposed does not have to be the minimum-mandatory term. Any sentence imposed under the section requiring the minimum-mandatory penalty will be entitled to jail credit.

b. Sentences imposed on and after September 20, 1966.

(1) Jail time credit will be given for time spent in the custody of the Attorney General (whether actual or constructive) as a direct result of the acts or offenses which resulted in the federal sentence. (See Paragraph 5.c. for the criteria for constructive federal custody.)

(2) Jail time credit will not be given for any portion of time spent serving another sentence, either federal or non-federal, except that time spent serving a sentence that is vacated will be creditable toward another sentence if the later sentence is based on the same charges that led to the prior, vacated sentence. When failure to make bail due to indigency is a moot point, e.g., when another sentence is operative for the period of time in question, and any bail would not result in a change in custody status, then applying jail time would be giving double credit, i.e., credit on two separate and distinct sentences for the same period of time contrary to the intent of 18 USC 3568 to apply credit to sentences.

(3) Time spent under a writ of habeas corpus from non-federal custody will not, in itself, be considered for the purpose of crediting jail time. The primary reason for custody in this case is not the federal charge. In this situation, it is considered that the federal court "borrowed" the prisoner under the provisions of the writ for purposes of

court appearance. This is secondary custody. Credit may infrequently be given under provisions of another paragraph.

(4) Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) under P.L. 91-492 as a condition of parole (18 USC 4209) or probation (18 USC 3651) is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of probation is creditable as jail time because of the greater degree of restraint.

(5) Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) under the provisions of 18 USC 3146 as a condition of bail or bond, including the "Pretrial Services" program (18 USC 3152-3154), is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. Also, a "highly restrictive" condition of bail or bond, such as requiring the defendant to report daily to the U. S. Marshal, is not considered as time

in custody. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time because of the greater degree of restraint.

c. Constructive Federal Custody.

(1) For time in non-federal custody when the non-federal custody is bases [*sic*] on charges that later resulted in a federal sentence:

(a) Credit will be given for all time spent in non-federal or foreign custody when the underlying basis for custody in fact is a federal warrant. For example, if a federal warrant is issued and the prisoner is arrested by county police or foreign officials on the basis of the federal warrant, credit will be given from the date of arrest to the date of sentence for all days in custody. Inquiries or requests for foreign jail time credit, along with copies of the judgment and commitment and BP-5, and copies of any documentation in the institution or in the possession of the inmate, must be sent to the central office Chief of Administrative Systems for verification and monitoring purposes.

(b) If the federal inmate has been in presentence state custody on essentially the same charges, credit will also be given even though a federal detainer

may not have been on file during that time. Credit will be given for time spent in non-federal pre-sentence custody when the non-federal and federal charges are similar enough to be considered the same criminal act or offense. This is applicable when the factors of time, location, and the criminal acts are identical in both charges. Credit will also be given for all time spent serving a state sentence (on the same charges as defined in this paragraph) which is later vacated, set aside, or dismissed, in addition to any other non-federal presentence time. Following are some situation examples:

*1* If a prisoner is arrested by county police on a state charge of armed robbery, and the prisoner is later convicted by the federal government of bank robbery, which bank robbery occurred during the same, identical act of armed robbery, credit will be given for all time spent in custody from the date of arrest to the date of the imposition of the first sentence (whether federal or non-federal).

*2* If a prisoner is arrested by state police on a state charge of auto theft, and the prisoner is later convicted of a Dyer Act violation, involving theft of the same automobile in both state and federal charges, credit will be

given for all time spent in custody from the date of arrest to the date of imposition of the first sentence (whether federal or non-federal). Credit is applicable because the state auto theft was the same criminal act, at the same time and place as the Dyer Act violation.

*3* If a prisoner is arrested by city police on a state charge of uttering a forged check and the prisoner is later convicted by the federal government for mail theft, the prisoner having obtained the check in question from the mails, credit will not be given. It is not the identical criminal act. Uttering requires a separate criminal act from theft of the check.

*4* If a prisoner is arrested by county police on a state charge of armed robbery and the prisoner is later convicted by the federal government for possession of an unregistered firearm, which is the same firearm used in the robbery, credit will be given.

*5* If a prisoner is arrested by county police on a state charge of uttering forged checks and the prisoner is later convicted of conspiracy to defraud the U.S. Government, the checks in question being U.S. Treas-

ury checks used in the forgery, credit will *not* be given.

(2) For time in non-federal custody when the non-federal custody is based on charges that are unrelated to the federal charges that resulted in a federal sentence:

(a) Credit will be given on any subsequent federal term of imprisonment (to include parole and mandatory release violator terms) when the state withdraws, increases, or refuses to set bail, solely due to the fact that a federal detainer is lodged, and the state fails to give jail time credit for that time. [C]redit will be given from the time the federal detainer is lodged up to the time the sentence is executed (either federal or non-federal). The state authorities must verify the fact that their bail status is due to the lodging of the federal detainer. Failure to give jail credit (by the state) may be assumed in any of the following events: (1) the state charges are dismissed, (2) the state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's award of jail credit, (3) state probation is granted, or (4) the state orders their sentence to run concurrently with the federal sentence, and the state sentence will be absorbed prior to grant of good time, resulting in no benefit from the state jail time. Ordinarily, if a sentence results from state

charges, there will be a presumption that the prisoner did receive credit for presentence time, however, this may be rebutted if the prisoner can demonstrate that the state did not credit the time.

(b) Credit will be given when a federal detainer is lodged, the prisoner does not make state bail based on a presumption of indigency, and the state fails to give jail credit for time. Credit will be given from the date the federal detainer was lodged up to the beginning date of either the federal or non-federal sentence, whichever occurs first. State bail must have been set. If the state charge was not bailable, no credit will apply to the federal sentence. Failure to give jail credit (by the state) may be assumed in any of the following events: (1) the state charges are dismissed, (2) the state sentence is vacated with further prosecution deferred, thereby effectively vacating the state's award of jail credit, (3) state probation is granted, or (4) the state orders their sentence to run concurrently with the federal sentence, and the state sentence will be absorbed prior to grant of good time, resulting in no benefit from the state jail time. Ordinarily, if a sentence results from the state charges, there will be a presumption that the prisoner did receive credit for presentence time, however,

this may be rebutted if the prisoner can demonstrate that the state did not credit the time.

(3) For time spent in custody of the Surgeon General as a civil commitment under Title I of NARA, credit will be given for all time in actual institutional confinement, if the later criminal sentence is a result of the same offense that led to the civil commitment. This is a specific provision of NARA, as codified under Title 28, U.S. Code, Section 2903(d).

6. *DOCUMENTATION.* Credit will be given only with proper documentation, indicating the prisoner was in custody within the application of paragraph 5. Proper documentation will consist of written documentation for the file from any law enforcement agency (including probation officers). This includes verified phone and teletype messages.

When there is cause to believe that credit may be due, arising from a request from the inmate or from other persons speaking in his behalf, or from any inconsistencies in the manner in which the factual situation presents itself, an effort to obtain the documentation necessary to make a determination will be made. Ordinarily this will consist of one communication (with written documentation that contact was made, either in the form of a carbon of the letter or teletype message, or by documenting the phone call) and one following communication if no response is received.

If the follow-up communication still produces no response, the matter should be referred to the Regional

Office. No further action should be taken locally in that particular case until instrction is received from the Regional Office.

Sample letters of suggested types of communications to other agencies are in the attachments to his Program Statement.

/s/ Norman A. Carlson
NORMAN A. CARLSON
Director

## APPENDIX G

**[Excerpt from Program Statement 5880.28, Sentence Computation Under 18 USC 3585 (July 29, 1994)]**

* * * * *

c. Prior Custody Time Credit. The SRA includes a new statutory provision, 18 U.S.C. § 3585(b), that pertains to "credit for prior custody" *and is controlling for making time credit determinations for sentences imposed under the SRA.* Title 18 U.S.C. § 3568, as implemented by Program Statement 5880.24, *Sentence Computation, Jail Time Credit Under 18 U.S.C. § 3568,* was repealed effective November 1, 1987, but remains the controlling statute for all sentences imposed for offenses that occurred on or after September 20, 1966 up to November 1, 1987.

*Statutory Authority*: Prior custody time credit is controlled by 18 U.S.C. § 3585(b), and states,

> "A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence."

*Definitions*:

* * * * *

Official detention. "Official detention" is defined, for purposes of this policy, as time spent under a

federal detention order. This also includes time spent under a *detention* order when the court has *recommended* placement in a less secure environment or in a community based program as a condition of presentence detention. A person under these circumstances remains in "official detention", subject to the discretion of the Attorney General and the U.S. Marshals Service with respect to the place of detention. Those defendants placed in a program and/or residence as a condition of detention are subject to removal and return to a more secure environment at the discretion of the Attorney General and the U.S. Marshals Service, and further, remain subject to prosecution for escape from detention for any unauthorized absence from the program/residence. Such a person is not similarly situated with persons conditionally *released* from detention with a requirement of program participation and/or residence.

A defendant is not eligible for any credits while *released* from detention. Time spent in residence in a community corrections center as a result of the *Pretrial Services Act of 1982* (18 U.S.C. § 3152-3154), or as a result of a condition of bail or bond (18 U.S.C. § 3141-3143), is not creditable as presentence time. A condition of bail or bond which is "highly restrictive," and that includes "house arrest", "electronic monitoring" or "home confinement"; or such as requiring the defendant to report daily to the U.S. Marshal, U.S. Probation Service, or other person; is not considered as time in official detention. Such a defendant is not subject to the discretion of the U.S. Attorney General, the Bureau of Prisons, or the U.S. Marshals Service, regarding participation, placement, or subsequent return to a more secure environment,

and therefore is not in a status which would indicate an award of credit is appropriate (see *Randall* v. *Whelan*, 938 F2d 522 (4th Cir. 1991) and *U.S. v Insley*, 927 F.2d 185 (4th Cir. 1991). Further, the government may not prosecute for escape in the case of an unauthorized absence in such cases, as the person has been lawfully *released* from "official detention". (*Exception*: As a result of case law in the Ninth Circuit, credit for time spent in a community treatment center as a condition of bond (including appeal bond) is considered the same as time spent in "official detention" for those sentenced in the Ninth Circuit, if they were required to spend nights in the community corrections center. The credit follows the inmate if transferred into some other circuit but an inmate sentenced in a circuit other than the Ninth Circuit shall not be given the credit if transferred into the Ninth Circuit. This same type of credit also applies to a defendant whose probation or supervised release is revoked in the Ninth Circuit, providing that the time spent in the community treatment center occurred after the conduct that caused the probation or supervised release to be revoked. It is unlikely that this type of credit will ever apply to a supervised release or probation revocation sentence since the conduct that causes the revocation usually follows the time spent in a community corrections center.)

Official detention does not include time spent in the custody of the U.S. Immigration and Naturalization Service (INS) under the provisions of 18 U.S.C. § 1252 pending a final determination of deportability. An inmate being held by INS pending a civil deportation determination is not being held in "official detention" pending criminal charges. (See *Ramirez-Osorio* v. *INS*, 745 F.2d 937, rehearing denied 751

F.2d 383 (5th Cir. 1984); *Shoaee* v. *INS*, 704 F.2d 1079 (9th Cir. 1983); and *Cabral-Avila* v. *INS*, 589 F.2d 957 (9th Cir. 1978), cert. denied 440 U.S. 920, 99 S.Ct. 1245, 59 L.Ed2d 472 (1979.)

A sentence imposed by a court for "Time Served," means that all time spent in official detention (prior custody time), as a result of the offense for which sentence was imposed, is included in the "Time Served" sentence which the court imposed and cannot be awarded to any other sentence.

Time spent serving a civil contempt sentence prior to trial and/or sentencing does not constitute presentence time credit toward the sentence that is eventually imposed.

Time spent serving a civil contempt sentence does not constitute presentence time credit toward any criminal sentence that has been interrupted by, or that is running along concurrently with, or that is to be served consecutively to, the criminal sentence.

Official detention does not include any time in a release status even though the defendant is considered "in custody" for purposes of pursuing a habeas corpus petition with the court, as cited by the U.S. Supreme Court in *Hensley* v. *Municipal Court*, 411 U.S. 345 (1973) (see also *Cochron* v. *U.S.*, 489 F.2d 691 (5th Cir. 1974); *Villaume* v. *United States*, 804 F.2d 498 (8th Cir. 1986) (per curiam), *cert. denied*, 481 U.S. 1022 (1987)).

* * * * *

(2) *DOCUMENTATION.* Prior custody credit will be given only with proper documentation indicating that the prisoner was in official detention within the application of paragraph 5. Proper documentation will consist of written documentation, for

placement in the prisoner's *Judgment and Commitment File*, from any law enforcement agency (including probation officers). This includes verified phone, fax, or teletype messages, PSI, Rap Sheet, Booking Sheets, Trial Transcripts, Sentry, USM Form 129, etc.

(a) When there is cause to believe that credit may be due, arising from an inmate request or from any other person speaking in his or her behalf, or from any other inconsistencies in the facts developed, an effort to obtain the documentation necessary to make a determination will be made. Ordinarily, this will consist of one communication (with written documentation that contact was made, either in the form of a copy of the letter, fax, or teletype message, or by documenting the phone call) and one following communication if no response is received.

(b) Should the Judgment and Commitment order make any reference to, or recommendations concerning prior custody credits, the term in effect may not be changed in an attempt to meet the language on the Judgment and Commitment. Contact with the court must be made, and the term in effect may only be changed when it is specifically approved by the court. See the ISM Manual regarding the preparation of any correspondence directed to the courts.

(c) No credit shall be given based solely on documents or information received from a prisoner, a defense attorney, or other person or organization acting on the behalf of the inmate. Information from such sources shall be thoroughly investigated and verified before credit may be given.

(d) If the follow-up communication produces no response, the matter should be referred to the appropriate Regional Inmate Systems Administrator.

(3) *QUESTIONABLE SITUATIONS.* Questions or problems that arise as to the applicability of any of the provisions of this policy shall be referred to the Regional Inmate Systems Administrator. Any resolution of a question or problem that may require a decision outside of, or contrary to, this policy or that may require a precedent setting decision, shall be referred to the Chief of Inmate Systems in the Central Office for review.

## APPENDIX H

[Filed May 3, 1994]

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

---

92-CV-1458

ZIYA K. KORAY

*v.*

SIZER, ET AL.

---

ORDER

IT IS HEREBY ORDERED THAT ZIYA K. KORAY, Register Number 37880-053, be released from the Federal Prison Camp at Allenwood on May 4, 1994, at 6:00 a.m. Pending further order by this Court, Ziya K. Koray shall comply with the following conditions:

—He shall report as directed to the United States Probation Office in this district or as otherwise directed;

—He shall notify the Court, the Clerk of Court, his attorney and the United States Attorney of any change in residence address; and

—He shall not leave the United States without the approval of the Court.

Date: May 3, 1994

/s/ Edwin M. Kosik
EDWIN M. KOSIK
United States District Judge

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ORIGINAL

Supreme Court, U.S.
FILED
DEC 23 1994
OFFICE OF THE CLERK

No. 94-790

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

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JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

ZIYA K. KORAY, RESPONDENT

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

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December 23, 1994

## QUESTION PRESENTED

Whether "official detention" in 18 U.S.C. § 3585(b) includes a court order of confinement in a jail-type facility such as a halfway house as a condition of bail.

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No. 94-790

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

---

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

ZIYA K. KORAY, RESPONDENT

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

# RESPONDENT'S BRIEF IN OPPOSITION

---

The respondent, Ziya K. Koray, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Third Circuit's opinion in this case. That opinion is reported at 21 F.3d 558.

On April 25, 1994, the United States Court of Appeals for the Third Circuit reversed the district court's denial of Koray's habeas corpus petition, finding that "official detention" for purposes of sentence credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement. (Pet. 23a). In reaching this conclusion the court of appeals was persuaded by factual allegations in Koray's habeas corpus petition, which were

unchallenged by the Bureau of Prisons (BOP or Bureau), and indicated that he was subjected to substantial restrictions on his liberty. Specifically, the court stated that Koray was permitted to leave the facility only once in 150 days (for a medical exam), he had to account for his presence five (5) times a day, he was subject to random breath and urine tests, his access to visitors was limited in both time and manner, and there was a paucity of vocational, educational, and recreational services compared to a prison facility. (Pet. 19a-20a). The court of appeals stated that the BOP admitted that the halfway house in question was maintained similar to the manner in which the BOP may operate such a facility. (Pet. 20a).

The court of appeals began its analysis of the relevant question by reviewing the history of the credit statutes. (Pet. 3a-5a). The court opined that Congress has been expanding jail credit since 1966. This trend has continued and in 1984, Congress rewrote Section 3568 and changed it to its present form in Section 3585, which enlarged the class of defendants eligible to receive credit by replacing the term "custody" with the term "official detention". (Pet. 4a-5a).

The court of appeals wrote that it has had few opportunities to consider the scope of either Section 3585 or its predecessor. (Pet. 5a-7a). Other courts of appeals that have considered this issue are divided. Most courts of appeals have determined that Section 3585, like its predecessor Section 3568, does not require the BOP to credit presentenced defendants whose bail conditions

allowed them to be confined outside BOP facilities; however, that conclusion was not reached without dissent. (Pet. 7a-8a). The court of appeals noted that the Ninth Circuit has rejected the conclusion reached by the other circuits, holding instead that when conditions of release approach those of incarceration, a detainee is in "official detention" for purposes of Section 3585. (Pet. 8a).

The court also noted that some of the courts, in denying credit, have deferred to the interpretation of the statute adopted by the BOP. (Pet. 8a). The court opined that it would not defer to the BOP's interpretation of the statute because it appears in a Program Statement, which is merely an internal agency guideline and may be altered at will, rather than in published regulations subject to the rigors of the Administrative Procedures Act, including public notice and comment. (Pet. 9a).

The court of appeals observed that the rationale given by the Bureau for its refusal to award credit for time spent by a pretrial detainee in a halfway house is different under Section 3568 than under Section 3585. (Pet. 9a-11a). Previously, under Section 3568, the Bureau focused on the degree of restraint, distinguishing between time in a residential community center as opposed to time in a jail-type facility. The court refers to this as a functional analysis. (Pet. 9a-10a). The BOP, however, has interpreted Section 3585 in terms of whether the defendant has been released to pretrial services or detained by the Attorney General pursuant to 18 U.S.C. § 3142(a). (Pet. 10a).

The court of appeals noted that this distinction in approaches is highly significant for Koray because under the earlier rationale he might have been able to convince the BOP or a court that his conditions of confinement in the Volunteers of America facility were similar to those in a jail-type facility and that credit was appropriate. Koray does not have that opportunity under the BOP's current rationale because he is clearly in the custody of pretrial services rather than the Attorney General. (Pet. 11a).

The court of appeals stated that in order to determine if this change in rationale withstands the "reasoned analysis" standard, the court must examine the statutory change from "custody" to "official detention" in Sections 3568 and 3585. (Pet. 11a). The court further stated that the legislative history of this change is unenlightening, and Congress used the terms "custody", "official custody", "confinement", and "official detention" interchangeably. Also, the court noted that the title of Section 3585(b) remained as "Credit for Prior Custody". (Pet. 11a-13a).

The court of appeals concluded, as have all other circuits to have considered the issue, that use of the words "official detention" rather than "custody" was not meant to alter the meaning of the statute. (Pet. 13a). Therefore, before the court could defer to the BOP's interpretation of this statutory change, they must determine whether the BOP had any sustainable rationale for reading "official detention" as if it provided "official

detention by the Attorney General or the BOP". (Pet. 13a). The plain meaning of the words does not require this result and there is nothing in Section 3585 which mandates or even suggests that a defendant must be under the detention of the BOP. (Pet. 13a-14a). A court may detain a person as officially as the Attorney General. (Pet. 14a).

The court concluded that it is difficult to view Koray's detention as other than "official" since he was in the custody of pretrial services and confined to a halfway house by court order. (Pet. 14a). Koray's failure to comply with the conditions of release would subject him to a felony prosecution which provides more severe punishment than an escape charge. (Pet. 14a).

Additionally, the BOP does not always limit "official detention" to that served under the custody of the Attorney General. The BOP has characterized other custody as "constructive felony custody" and has given presentenced defendants credit under both Section 3585 and Section 3568 for certain time spent in state facilities, even though the defendant was not in the Attorney General's custody. (Pet. 14a-17a).

The court of appeals concluded that it could not afford even minimal deference to the BOP's interpretation of Section 3585 because of the complete absence of support for their position in the statute as well as the legislative history. (Pet. 18a).

The court of appeals stated that in construing the statutory language of Section 3585, it cannot ignore the obvious and ordinary meaning of the statutory language. To most people,

being forced to live in a halfway house is to be held in custody. (Pet. 18a).

The Third Circuit commented that other organizations agree with their interpretation of "custody", including the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals. (Pet. 18a-19a).

The court of appeals opined that they are not prepared to consider all alternative sentencing mechanisms as creditable, and that they agree with Judge Heaney, writing for the dissent in Moreland v. United States, 968 F.2d 655, 664 (8th Cir.) (en banc) (plurality), cert. denied, ___ U.S. ___, 113 S.Ct. 675 (1992), that the degree of confinement is what is at issue. (Pet. 19a).

The court stated that the BOP argued that a bright-line rule is necessary for administrative purposes. The court also stated that some courts have agreed. The facts, however, in many of those cases were not as "jail-like" as in the instant case. (Pet. 20a).

The court of appeals held that it will not be administratively difficult to give credit for time served by defendants under jail-type detention. The court stated further that few defendants will be affected by this ruling because only a small percentage of federal defendants are released on bail to a halfway house. (Pet. 21a). The court also noted that the BOP was able to incorporate the Ninth Circuit's decision into its Program Statement, and that there have not been any allegations, much less evidence, that this overwhelmed the BOP's

administrative process. (Pet. 21a-22a).

The court determined that it would be inherently unfair to deny credit to a defendant who sought bail but was confined under jail-like conditions without giving the defendant notice that this would occur. The Third Circuit noted that the defendant may have decided against requesting bail under these circumstances. (Pet. 23a). Further, the court noted that the Government continues to derive the full benefits of incarceration, protecting the public and ensuring the defendant's presence in court, at a lower cost, while preserving scarce jail space for the truly dangerous offenders. (Pet. 23a).

Therefore, the Third Circuit concluded that "official detention" for purposes of credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement. The court stated that this decision is consistent with the language of the statute, Congress' intent and the BOP's rationale under Section 3568. (Pet. 23a). Finally, the court opined that their ruling should not be difficult to apply because it is limited to the few defendants who were or will be housed pretrial, in jail-like situations. (Pet. 23a). The court of appeals remanded the case to the district court for a factual finding of the circumstances surrounding Koray's presentence incarceration. (Pet. 24a).

**REASONS WHY THE PETITION SHOULD BE DENIED**

1. The petition inaccurately argues that the court of appeals' decision in the instant case creates a three-way split

in the circuits. The Third Circuit's holding that "official detention" for purposes of credit under 18 U.S.C. § 3585 includes time spent under conditions of jail-type confinement, (Pet. 23a), is virtually the same as the Ninth Circuit's decisions in Fraley v. United States Bureau of Prisons, 1 F.3d 924, 925-26 (9th Cir. 1993); Lahey v. Floyd, 992 F.2d 234, 235-36 (9th Cir. 1993); Mills v. Taylor, 967 F.2d 1397, 1400-01 (9th Cir. 1992); and Brown v. Rison, 895 F.2d 533, 536 (9th Cir. 1990), where the court held that when conditions of release approach those of incarceration, a detainee is in "official detention" for purposes of Section 3585. (Pet. 8a). Thus, there is a two-way, not three-way split in the circuits.

This split was created when the Ninth Circuit decided Brown v. Rison in 1990. The Government did not seek rehearing en banc in the Ninth Circuit at that time, nor did the Solicitor General petition this Court to review the issue. Further, the Solicitor General never sought this Court's review of this issue in several other cases decided by the Ninth Circuit in 1992 and 1993, which followed Brown v. Rison.

In fact, rather than challenging the Ninth Circuit's approach to this presentence credit issue, the BOP revised its Program Statement 5880.30(7)(b)(6) to accommodate the Ninth Circuit's decision in Brown. (Pet. 22a). There is no reason why the BOP cannot accommodate the Third Circuit's ruling in a similar fashion.

Additionally, the petition suggests that the split between

the Third and Ninth Circuits and the other circuits that have ruled on this issue is rather clear cut. (Pet. 5). To the contrary, as illustrated by the court of appeals, the conclusions of the other circuits have not been reached without dissent. See, Moreland v. United States, 968 F.2d 655, 659-60 (one judge concurring in judgment and five judges dissenting); United States v. Wickman, 955 F.2d 592, 594 (8th Cir. 1992) (Lay, C.J., dissenting); Randall v. Whelan, 938 F.2d 522, 545 (4th Cir. 1991) (Butzner, J., dissenting); United States v. Westmoreland, 974 F.2d 736, 740-45 (6th Cir. 1992) (Engel, J., dissenting), cert. denied, ___ U.S.___, 113 S.Ct. 1818 (1993). (Pet. 7a-8a).

2. The Solicitor General and the BOP are using the instant case to revisit an issue which this Court previously declined to review two years ago on December 7, 1992, in Moreland v. United States, 113 S.Ct. 675 (1992) (No. 92-458). (Pet. 14).

3. The petition grossly exaggerates the effect of the court of appeals' decision by arguing that the BOP is not equipped to make the factual determinations that the Third Circuit's decision will require, that the BOP will not have access to the information it needs to make presentence credit decisions, that the BOP will be unable to rely on information it receives from privately operated community treatment centers, that the BOP will now be required to investigate conditions of confinement and that the court of appeals' decision will create a flood of cumbersome

litigation[1]. (Pet. 14-18). The fact is that none of the above conditions have presented themselves as a result of the Ninth Circuit's 1990 decision that a detainee is in "official detention" as stated in 18 U.S.C. § 3585 when conditions of release approach those of incarceration. As observed by the court of appeals, "the Bureau was able to incorporate the Ninth Circuit's decision into its Program Statement, and there is no allegation, much less evidence, that this overwhelmed the Bureau's administrative process." (Pet. 21a-22a).

Few defendants will be affected by the court of appeals' decision. This case is limited to its facts and will have little applicability to other situations. In the first instance, it is very rare for a defendant to be confined pretrial to a community treatment center or halfway house. Secondly, it is even more unusual for a defendant to be confined to such a location twenty-four (24) hours a day without the opportunity to leave for work purposes. (Pet. 21a).

The BOP is seeking this Court's review of this issue because they want a bright-line rule which denies credit to all defendants who are confined pretrial under jail-like conditions.

---

[1] The facts relied upon in the petition with regard to Bilgrami v. Turner, No. 93-7793 (July 13, 1994), are clearly inaccurate. (Pet. 17, n.8). Mr. Bilgrami was not residing at a luxury condominium located in an exclusive Tampa, Florida development, where he was to pay for private guards who would ensure that he appeared for trial. He was imprisoned in a housing unit, not his own home, for nearly two (2) years, where he was guarded twenty-four (24) hours a day by armed officers who were under court order to arrest him if he attempted to leave the apartment. Bilgrami's movement was completely restricted, and for all practical purposes he was in jail.

They perceive that such a ruling would be easier for them to implement. However, the BOP has completely ignored "the inherent unfairness in declining to grant credit to a defendant who sought bail but was confined under jail-like conditions without giving the defendant notice that this would be the result. Some defendants, such as Koray, might choose not to request bail under these circumstances, particularly if the alternative is 'official detention' in a minimum-security type institution with facilities superior to those in the halfway house in question." (Pet. 23a).

Further, it is unfair to deny credit for pretrial confinement when the defendant would be entitled to credit for the exact same type of confinement had it occurred postsentence. (Pet. 20a). The Government is deriving all of the benefits of pretrial incarceration, including protecting the public and ensuring the defendant's presence at trial, at a lower cost, while also freeing scarce jail space for truly dangerous offenders. (Pet. 23a).

4. The petition erroneously argues that the BOP's interpretation of 18 U.S.C. § 3585(b) is accurate, and that the Third Circuit erred in rejecting it. (Pet. 7-13).

a. The petition inaccurately argues that "official detention" in Section 3585(b) is the same as detention under 18 U.S.C. § 3142, the Bail Reform Act, because both statutes were enacted at the same time as part of the Comprehensive Crime Control Act of 1984. (Pet. 7-8). This assertion is based upon a misinterpretation of Sections 3585 and 3142.

Congress specifically equated "official detention" in 18 U.S.C. § 3585 with "custody" by entitling the section "Credit for Prior Custody." (Pet. 12a-13a). Congress references "release in the custody of" in 18 U.S.C. §§ 3142(c)(B)(i), 3142(c)(B)(xiii), and 3142(i) rather than simply "release". The precise articulation in both statutes, where the same term "custody" appears, indicates that sentence credit may be granted under a technical "release in custody" order, not just under a technical order of detention. Surely, if Congress had intended to exclude credit for persons who were "released in custody" in conditions of confinement, it would not have included the term "prior custody" when it enacted Section 3585 and its predecessor, Section 3568.

As stated above, Congress enacted Sections 3585 and 3142(c)(B)(i) at the same time, thereby enlarging the class of defendants who are eligible for credit for prior custody. Previously, the only individuals who could obtain credit were those who were "detained." However, with the enactment of Sections 3585, 3142(c)(B)(i) and 3142(i), all defendants who are "released in custody" are also eligible for credit for prior custody.

There is nothing in the legislative history of Section 3585 to indicate that "official detention" should be construed as narrowly as the petition suggests. Cf. Perrin v. United States, 444 U.S. 37, 49-50 (1979). In fact, the legislative history demonstrates that Congress has continually expanded the class of

persons authorized to receive sentence credit for pretrial custody. See, Moreland v. United States, 968 F.2d at 664 (Heaney, J., dissenting).

The petition offers no authority for the argument that Congress, when it passed Section 3585, intended that Section 3142 should become the standard for determining "official detention" in the matter of credit for time served. See, Mills v. Taylor, 967 F.2d at 1400 ("detention" for purposes of Section 3142 is not synonymous with term as used in Section 3585); Moreland v. United States, 968 F.2d at 660 (same); United States v. Davis, 763 F.Supp. 638, 641 (D.D.C. 1991). See also, United States v. Wickman, 955 F.2d at 593 (Lay, C.J., dissenting) (Section 3585's legislative history is too scanty to discern Congressional intent). Rather, "custody" has always been the appropriate standard.

The court of appeals recognized that the plain meaning of the words "official detention" is critical to this analysis. (Pet. 13a, 18a). Section 3585(b) does not specifically require or suggest that a defendant be under the official detention of the Attorney General or the Bureau of Prisons. The statue merely says "official detention". (Pet. 13a-14a). The court of appeals acknowledged that a court may detain a person as officially as the Attorney General, and that it is difficult to view Koray's detention as other than "official" since he was put in the "custody" of pretrial services, and was confined to the halfway house by court order. (Pet. 14a).

The court of appeals noted that the BOP does not always limit "official detention" to that served under the custody of the Attorney General, and that they have characterized other custody as "constructive federal custody" and have been willing to give presentenced defendants credit under Section 3585 and its predecessor Section 3568 for certain time spent in state facilities, even though the defendant was not in the Attorney General's custody. (Pet. 15a-17a).

The court of appeals' analysis of the text of Section 3585(b) is logical, reasonable and consistent with the plain meaning of the statute.

b. The petition inaccurately argues that the history of the credit provision underscores its close ties to bail determinations. (Pet. 9-11). The problem with this historical analysis is that the modification to 18 U.S.C. § 3568, which provided credit for time in custody prior to the imposition of sentence for want of bail set for the offense under which sentence was imposed, applied only to cases where the person held in custody was subject to a mandatory minimum sentence. Additionally, that modification was repealed in 1966 and was replaced with far broader language which was still in effect in 1984, when Section 3585 was passed. The 1966 revision provided that credit was to be afforded to any individual held presentence "in custody in connection with the offense or acts for which sentence was imposed".

Consequently, this legislative history, including the

deletion of the limiting language "for want of bail", supports the argument that Congress did not hinge the credit determination upon whether bail had been afforded. The law is clear that, but for an exception for those subject to mandatory minimum sentences, which lasted for only a short period of time, Congress has never limited the credit awarded to persons held in federal custody "for want of bail".

Moreover, the 1966 revision to Section 3568 is important because its broad standard of "custody", which was not tied to a formal bond or detention status under Section 3142, was the standard in effect at the time Section 3585 was enacted. The petition acknowledges that the phrase "official detention" in Section 3585(b) has the same meaning as the phrase "in custody" in its predecessor statute. (Pet. 11). Thus, "custodial" status, regardless of technical bond status under Section 3142, is the benchmark for determining credit for time served, as it was under Section 3568.

c. The petition erroneously argues that the court of appeals failed to give proper deference to the Bureau's interpretation of Section 3585(b).

Several other courts of appeals have taken issue with the BOP's interpretation of the statute. In United States v. Wickman, 955 F.2d at 594, Chief Judge Lay, the dissenting judge, wrote that, "I certainly acknowledge our duty to defer to administrative agencies' interpretations of the statutes, but when an interpretation runs contrary to the expressed language of

the statute such a view does not deserve consideration." In Moreland v. United States, 968 F.2d at 663-65, four judges sitting en banc joined Judge Heaney in a dissenting opinion rejecting the BOP's interpretation of the statute. The dissent argued that under Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984), "[i]f a court 'ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'" Moreland v. United States, 968 F.2d at 663. The dissent then concluded that in light of the ordinary meaning of the phrase "official detention" and congressional intent to enlarge the class of defendants eligible for credit, deference to the interpretation of the BOP would be inappropriate under Chevron. Moreland v. United States, 968 F.2d at 664.

Another strong argument against deferring to the judgment of the Bureau was set forth by the Ninth Circuit in Brown v. Rison, 895 F.2d 533 (9th Cir. 1990), where the court concluded that an interpretation that leads to an unfair result cannot be considered reasonable. The court stated that "[f]or purposes of Section 3568, we cannot accept as reasonable a definition of 'custody' that excludes enforced residence under the conditions approaching those of incarceration; to do so would be contrary to the consideration of fairness that must have underlain Congress' provision of credit for time served." Brown v. Rison, 895 F.2d at 536.

Thus, several courts of appeals agree with the Third Circuit

that the Bureau's interpretation of 18 U.S.C. § 3585(b) should not be accorded any deference because of the absence of any support therefor in the statute or legislative history. (Pet. 18a).

5. The petition relies heavily on the BOP's interpretation of the statute. It should be noted that the BOP is a division of and directed by the Attorney General. Therefore, the BOP's interpretation of the statute is not neutral because they are under the umbrella of the Attorney General, whose mission it is to protect society by confining offenders, not releasing them.

6. The type of restrictive, jail-like pretrial confinement at issue in this case is the product of the United States Attorney's Office which is a division of the Attorney General's Office, the BOP, as well as the Solicitor General. Thus, the presentence credit issue in this case is of the Department of Justice's own making, and they should solve it internally in their agencies rather than petitioning this Court for a review of the statute.

7. The community treatment center in question in this case, the Volunteers of America in Baltimore, Maryland, is an accurate and reliable facility, which is utilized as a postsentence halfway house where defendants receive credit toward their sentences. (Pet. 17).

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

**Melinda C. Ghilardi**
**First Assistant**
**Federal Public Defender**

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Supreme Court, U.S.
FILED
DEC 29 1994
OFFICE OF THE CLERK

No. 94-790

# In the Supreme Court of the United States

OCTOBER TERM, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

ZIYA K. KORAY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

# In the Supreme Court of the United States

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No. 94-790

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*v.*

ZIYA K. KORAY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

1. Respondent concedes (Br. in Opp. 7-8) that the courts of appeals are divided on the question presented by the petition—whether a defendant may obtain credit under 18 U.S.C. 3585 toward his sentence of imprisonment for time when he was released on bail pursuant to the Bail Reform Act of 1984. Respondent contends, however, that the Third Circuit essentially adopted the Ninth Circuit's approach, so that "there is a two-way, not [a] three-way split in the circuits." Br. in Opp. 8. The short answer to that claim is that the Third Circuit itself disclaimed any intention to "go as far as does the Ninth Circuit" (Pet. App. 23a), believing instead that it was crafting an intermediate position between the view held by the seven circuits that have upheld the Bureau of

Prisons' interpretation of 18 U.S.C. 3585 and the Ninth Circuit's view to the contrary.

In any event, review by this Court is warranted even if the decision below could be read simply as taking the Ninth Circuit's side in "a two-way * * * split in the circuits." Br. in Opp. 8. The Third Circuit's decision to join the Ninth Circuit makes clear that the split in the circuits will not abate through the en banc process in the lower courts. For that reason, there is no force to respondent's reliance (*id.* at 9) on this Court's denial of certiorari in *Moreland* v. *United States*, 113 S. Ct. 675 (1992) (No. 92-458), a case that raised the same credit issue, but at a time when the Ninth Circuit was the only court of appeals that had rejected the Bureau of Prisons' view.

2. Respondent also suggests (Br. in Opp. 8-9) that review is not warranted, because the government did not believe that the credit issue was sufficiently important to seek en banc review in the Ninth Circuit. Respondent is wrong. The government sought en banc review when the Ninth Circuit first rejected the then-unanimous weight of authority governing the predecessor statute (18 U.S.C. 3568 (repealed)) in *Brown* v. *Rison*, 895 F.2d 533 (1990), and again when that court extended its holding to 18 U.S.C. 3585 in *Mills* v. *Taylor*, 967 F.2d 1397 (1992). The Ninth Circuit declined to grant en banc review in both cases. *Brown* v. *Rison*, No. 88-5535 (July 11, 1990); *Mills* v. *Taylor*, No. 91-55362 (Oct. 29, 1992). Within days of the Ninth Circuit's rejection of our en banc suggestion in *Mills*, we acquiesced in the petition for a writ of certiorari that was then pending in *Moreland*, noting the conflict created by the Ninth Circuit's decisions. See Brief for the United States in No. 92-458 (filed Nov. 13, 1992). In our view, the Third Circuit's

departure from the majority rule only increases the need for this Court's resolution of the issue.

There is no greater merit to respondent's related suggestion (Br. in Opp. 8) that the government has acquiesced in the Ninth Circuit's minority view by providing credit for restrictive conditions of bail to defendants sentenced in that circuit. The government has had no choice but to comply with binding Ninth Circuit precedent. That does not imply agreement with the conclusions reached by that court. See *United States* v. *Williams*, 112 S. Ct. 1735, 1740 (1992). Moreover, respondent's suggestion that the government similarly could "accommodate" the views of the Third Circuit (Br. in Opp. 8) overlooks the key issue: the Bureau of Prisons is charged with administering a national prison system, in which prisoners must be moved among penal facilities located in different circuits as needed to preserve security and population balance. As we have explained (Pet. 14-15 & n.7), that national system does not lend itself to the type of balkanization proposed by respondent.

3. Respondent contends (Br. in Opp. 17) that review is not warranted, because "[t]he type of restrictive * * * confinement at issue in this case" is of the government's "own making" and therefore the government "should solve it internally" rather than seeking review in this Court. Respondent appears to suggest that the credit issue presented in this case could be avoided if the government refrained from seeking restrictive conditions of bail. The determination of what conditions of bail are necessary to secure the presence of the defendant and the safety of the community, however, is committed to the courts, not to the government. See 18 U.S.C. 3142(c). And even if that were not so, respondent has not explained why the government should be required to elect

between enforcement of two applicable statutes—the Bail Reform Act of 1984 and Section 3585. That the government could solve the problem "internally" by abandoning its legal position is not a reason for denying plenary review.

* * * * *

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

DECEMBER 1994

(2)

No. 94-790

Supreme Court, U.S.
FILED
FEB 22 1995
OFFICE OF THE CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1994

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JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

ZIYA K. KORAY

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## JOINT APPENDIX

---

IRWIN ROCHMAN
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PETITION FOR WRIT OF CERTIORARI FILED NOVEMBER 1, 1994
CERTIORARI GRANTED JANUARY 13, 1995

BEST AVAILABLE COPY

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U.S. DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA
(SCRANTON)

---

Civil Docket for Case No.: 92-CV-1458

KORAY

*v.*

SIZER, ET AL.

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**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 10/15/92 | PETITION FOR WRIT OF HABEAS CORPUS Receipt #: Amt: (1s) |
| 10/15/92 | MOTION by Ziya K. Koray for appointment of counsel (1s) |
| 10/15/92 | MOTION by Ziya K. Koray to proceed in forma pauperis (1s) |
| 10/15/92 | Prisoner letter issued as to Ziya K. Koray with Notice and Consent Form (1s) |
| 10/15/92 | Remark case file to Prose Law Clk copy dkt sheet to Judge Kosik (1s) |
| 10/23/93 | ORDER by Judge Edwin M. Kosik that: 1) Motion for appointment of counsel is denied [2-1] (cc: Koray) (kn) |
| 10/23/92 | Doc 4 to Prose Law Clerk. (kn) |
| 10/23/92 | ORDER by Judge Edwin M. Kosik that: 1) Petitioner is granted temporary leave to proceed ifp; 2) W/in 10 days of the date of this order, the warden or other appropriate official shall complete the attached affdt form and provide the requested info to the court; 3) Warden shall provide a copy of the completed affdt to the petitioner. (cc: Koray, Warden at FPC Allenwood) (kn) |

| DATE | PROCEEDINGS |
|---|---|
| 10/23/92 | Doc 5 to Prose Law Clerk (kn) |
| 11/4/92 | Affidavit of Ziya K. Korry regarding order [5-1] to provide fin info of prisoner with present bal of 85.53 and average monthly $127.07 (1s) |
| 11/4/92 | Remark doc 6 to Prose Law Clark (1s) |
| 11/5/92 | MOTION by Ziya K. Koray for appointment of counsel (1s) |
| 11/5/92 | Remark doc 7 to Prose Law Clerk (1s) |
| 11/10/92 | ORDER by Judge Edwin M. Kosik prisoner to pay partial filing fee of $5.00 or send written explanation demonstrating his lack of accessibility. (cc: pltf) (1s) |
| 11/10/92 | Remark doc 8 to Prose Law Clerk (1s) |
| 11/10/92 | ORDER by Judge Edwin M. Kosik denying motion for appointment of counsel [7-1] (cc: all counsel) (1s) |
| 11/10/92 | Remark doc 9 to Prose Law Clerk (1s) |
| 11/12/92 | Letter to court from F.C. Sizer with prisoner fin acct info (1s) [Entry date 11/16/92] |
| 11/16/92 | Remark doc 10 to Prose Law Clerk (1s) |
| 12/14/92 | Receipt from pltf for $5.00 per 11/10/92 order. (rm) [Entry date 12/18/92] |
| 12/17/92 | Request by Ziya K. Koray for status of filing fee (1s) [Entry date 12/18/92] |
| 12/18/92 | Remark doc 11 to Prose law Clerk (1s) |
| 12/22/92 | Remark doc 29 to basement (1s) |
| 12/22/92 | ORDER TO SHOW CAUSE: by Judge Edwin M. Kosik 1. The Clerk of Ct is directed to serve a copy of petn on the respondents and US Atty. 2. Respondts within 20 days of dte of this order shall respond. (cc: petnr, US Atty, Atty Gen) by cert mail (1s) |

| DATE | PROCEEDINGS |
|---|---|
| 12/28/92 | RETURN OF SERVICE upon respondent Frank Sizer no date of signature on green card (1s) [Entry date 12/30/92] |
| 12/30/92 | Remark doc 14 to Prose Law Clerk (1s) |
| 1/5/93 | RETURN OF SERVICE executed upon respondent USBP 12/29/92 (1s) |
| 1/5/93 | RETURN OF SERVICE executed upon respondent Atty Gen of US 12/28/92 (1s) |
| 1/5/93 | Remark doc 15 to Prose Law Clerk (1s) |
| 1/11/93 | Response by respondents and C of S (1s) |
| 1/11/93 | Remark do 16 to Prose Law clerk (1s) |
| 2/2/93 | In response to the Government Motion (Traverse) by petitioner Ziya K. Koray to response [16-1] (bs) |
| 2/2/93 | Remark doc. 17 to Prose law clerk on 2/2/93. (bs) |
| 4/30/93 | ORDER by Judge Edwin M. Kosik Case terminated 1. The petn for a writ of h/c is denied. 2. the Clerk of Ct is directed to close this file. 3. Any appeal from this decision will be deemed frivolous, not taken in good faith, and lacking probable cause. (cc: all counsel) orig in sec cc in file (1s) |
| 5/4/93 | Remark file to basement on 5/4/93. (bs) |
| 5/17/93 | Notice of appeal by petitioner Ziya K. Koray from District Court order filed 4/30/93 [18-2] (filing fee not paid, certified copies of notice of appeal, order being appealed, with info/ack letter to USCA. (cc: Koray, all counsel, J. Kosik) (kn) [Entry date 05/18/93] |
| 5/25/93 | Record on appeal transmitted to USCA consisting of docs 1-19 and 1 certif copy of docket, 1 uncertif copy of docket. (kn) [Edit date 05/25/93] |

| DATE | PROCEEDINGS |
|---|---|
| 5/27/93 | Notification by Circuit Court of Appellate Docket Number 93-7357 (ps) |
| 5/27/93 | Doc. #20 to file in back of room 423. (ps) |
| 6/1/93 | MOTION by petitioner to proceed in forma pauperis on appeal (1s) [Entry date 06/02/93] |
| 6/2/93 | Remark doc 21 to Kosik for approval (1s) |
| 6/7/93 | Acknowledgement Received fr Ct of Appeals for actual record on appeal. Recv'd on 5/27/93 (jw) [Entry date 06/08/93] |
| 6/8/93 | ORDER by Judge Edwin M. Kosik granting motion to proceed in forma pauperis on appeal [21-1] (cc: Koray) (bs) [Edit date 06/08/93] |
| 6/8/93 | Transmitted 1st supplemental record on appeal to USCA consisting of doc. 23. (bs) |
| 6/8/93 | Doc. #21 to file in back of rm. 423. (ps) |
| 6/15/93 | Acknowledgement Received fr Ct of Appeals for 1st supplemental on appeal. Recv'd on 6/10/93. (jw) |
| 4/26/94 | Certified copy of judgment from USCA judgment of the said District Ct entered 4/30/93, be and the same is hereby reversed and remanded to the District Ct for further proceedings consistent with the opinion of this Ct. The District Ct should conduct those proceedings with expedition, because the time that Ziya K. Koray must serve in prison will have expired if he is entitled to credit for the time he was confined in the Volunteers of America facility. The mandate shall issue forthwith. Costs taxed against appellee. All of the above in accordance with th opinion of this Ct. Cert as a true copy and issued in lieu of a formal mandate on 4/25/94 (Opinion attached) (1s) |
| 4/26/94 | Remark case file to Judge Kosik (1s) |

| DATE | PROCEEDINGS |
|---|---|
| 4/28/94 | Written status report by respondents. (rm) |
| 4/28/94 | 26 TO PROSE LAW CLERK. (rm) |
| 4/29/94 | ORDER by Judge Edwin M. Kosik that: petitioner, Ziya K. Koray, is released from the custody of the Bureau of Prisons to the custody of the Immigration and Naturalization Service on its detainer for whatever deportation proceedings that agency determines to be appropriate; IT IS HEREBY FURTHER ORDERED that the Immigration and Naturalization Service, when it takes final action in Petitioner's case, will advise this Court so that, if necessary, further consideration of bail Ziya K. Koray can take place. (cc: Plntf, FPD, USA, Faxed to B of Prisons & INS) (kn) [Edit date 04/29/94] |
| 5/2/94 | ORDER by Judge Edwin M. Kosik the Federal Public Defender is appointed to represent the petnr Atty added for Ziya K. Koray (cc: Koray and FPD) (1s) [Entry date 05/04/94] |
| 5/3/94 | ORDER by Judge Edwin M. Kosik that Ziya K. Koray Reg. Number 37880-053 be released from the Federal Prison Camp at Allenwood on 5/4/94 at 6:00 am pending further order by this Ct, Ziya K. Koray shall comply with the following conditions: He shall report as directed to the USPQ in this district. He shall notify the ct, the Clerk of Ct his atty and the US Atty of any change in residence address; and He shall not leave the US without the approval of the Ct. (cc: cert copy USP, Deft, USM USPA) orig in sec cc in file (1s) [Entry date 05/04/94] |
| 5/3/94 | Supplemental status report by defts C of S (1s) [Entry date 05/06/94] |
| 5/9/94 | Letter to court from petitioner Ziya K. Koray requesting status of case. (bs) [Entry date 05/11/94] |

| DATE | PROCEEDINGS |
|---|---|
| 5/23/94 | INFORMATION SHEET ON POST DECISION MATTERS—fr Ct of Appeals. An order was filed on 5/20/94 extending the time for filing a petn for rehearing to 6/8/94. (jw) |
| 6/13/94 | INFO SHEET ON POST DECISION MATTERS that a petn. for rehearing on behalf of Appellees was filed on 6/8/94. (bs) [Entry date 06/14/94] |
| 6/21/94 | INFORMATION SHEET ON POST DECISION MATTERS—fr Ct of Appeals. An order was filed on 6/17/94 denying the petn for rehearing. (jw) [Entry date 06/22/94] |
| 6/22/94 | ORDER by Judge Edwin M. Kosik 1. The Clerk of Ct. shall close this file for statistical purposes. 2. The Ct will restore this case to the active dkt if and when additional proceedings are required in the district. 3. This order shall not prejudice the rights of the parties. Case terminated (cc: all cousel) orig in sec cc in file (1s) [Entry date 06/23/94] |
| 6/23/94 | Remark case file basement (1s) |
| 7/1/94 | Mail Returned addressed to Ziya K. Koray RE 6/22/94 order. (rm) [Entry date 07/07/94] |
| 7/7/94 | 36 to prose law clerk. (rm) |
| 7/14/94 | Remark Doc #36 to Basement (jw) |
| 10/26/94 | NOTICE by petitioner of change of address to Farmingdale, NY: CC thereon (jb) [Entry date 10/31/94] |
| 10/31/94 | Remark: Doc #37 to FRUS (jb) |
| 11/9/94 | Notice from USCA a petition for writ of certiorari was filed on 11/1/94 in the Supreme Ct at S.C. No. 94-790. (1s) [Entry date 11/15/94] |
| 11/15/94 | Remark doc 38 to basement (1s) |

| DATE | PROCEEDINGS |
|---|---|
| 1/23/95 | INFO SHEET ON POST DECISION MATTERS from USCA that a petn. for writ of certiorari was granted on 1/13/95. (info copy Judge Kosik) (bs) [Entry date 01/24/95] |

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

---

Case No. R-91-0188-R

UNITED STATES OF AMERICA

*v.*

ZIYA KAMIL KORAY

---

**ORDER SPECIFYING CONDITIONS OF RELEASE**

It is hereby ORDERED that the above-named defendant be released upon the following conditions:

(1) That the defendant shall not violate any federal, state or local law during the period of release.

(2) That the defendant shall notify the Magistrate or Court immediately upon any change of address.

(3) That the defendant shall appear at all proceedings as required at such places and times as may be required in the future.

(4) That if convicted, the defendant shall abide by any judgment entered in this matter and shall surrender for service of any sentence which may be imposed as directed or required and shall otherwise obey any order or direction that may be issued in connection with the judgment or sentence of the Court.

(5) That the defendant shall next appear at (if blank, to be notified)

Honorable Norman P. Ramsey

Place

U.S. Courthouse, Balto., MD

9/6/91 @ 9:30 am

Date and Time

Part I—Release on Personal Recognizance or Unsecured Bond

It is FURTHER ORDERED that the defendant be released provided that:

(X) (6) The defendant promises to appear at all scheduled proceedings as required and to surrender for service of any sentence which may be imposed.

( ) (7) The defendant shall execute an unsecured appearance bond binding the defendant to pay the United States the sum of ———— dollars ($————) in the event of a failure to appear as required or to surrender as directed for service of any sentence which may be imposed.

Part II—Other or Additional Conditions of Release

The Court having determined that release by the above conditions will not reasonably assure the appearance of the defendant as required or will endanger the safety of any other person or the community, it is hereby FURTHER ORDERED that the defendant be released on the additional condition(s) marked below:

(✓) (8) The defendant is placed in the custody of

Name of person or organization: Pretrial Services Agency —PSO Skidmore

Address: 101 W. Lombard Street, Room 101

City and State: Baltimore, MD 21201

(Tele. No.): 962-4820

who agrees (a) to supervise the defendant in accordance with all conditions of release, (b) to use every effort to assure the appearance of the defendant at all required Court proceedings before the United States Magistrate or Court, and (c) to notify the Magistrate or Court im-

mediately in the event the defendant violates any condition of release or disappears.

SIGNED: _____ SIGNED: _____
Custodian Custodian

(✓) (9) The defendant shall report to the Pretrial Services Agency at least two time(s) each week and otherwise report as that agency may direct.

(✓) (10) The defendant shall satisfactorily participate in any program of rehabilitation as may be directed or required by the Pretrial Services Agency to include, but not limited to the following: evaluation, urinalysis and/or treatment for substance abuse.

( ) (11) The defendant shall maintain or actively seek employment.

( ) (12) The defendant shall maintain or commence and satisfactorily participate in an educational program of the following types: _____

(✓) (13) The defendant shall refrain from the possession of any firearm, destructive device or any other dangerous weapon.

(✓) (14) The defendant shall refrain from the excessive use of alcohol.

(✓) (15) The defendant shall refrain from any use or unlawful possession of a narcotic drug or other controlled substance as defined in 21 USC 802 unless same is prescribed by a licensed medical practitioner.

( ) (16) The defendant shall undergo medical and/or psychiatric treatment and remain in the following institution if required for said treatment _____

_____

(X) (17) The defendant shall abide by the following restrictions on his or her personal associations, place of

abode, or travel: The defendant shall not leave the state of Maryland without first obtaining permission of the Court except as may be otherwise permitted by this Order

---

( ) (18) The defendant shall not without Court Order enter the following premises: ———————

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( ) (19) The defendant shall not change his or her address without the permission of the Court.

(✓) (20) The defendant shall reside at the following halfway house type facility: Volunteers of America, 4601 E. Monument Street, Balto. MD 21205 (276-5880) and shall satisfactorily comply with all rules and regulations required or residents of the facility, and shall not change his or her address without the permission of the Court.

( ) (21) the defendant shall observe a curfew by physically being present on the premises of his residence or other required place of abode between the hours of —— and —— each day.

( ) (22) The defendant may be released for employment, schooling or the following limited purposes ——— —— during the hours of ——— and ——— each day (excluding Saturdays, Sundays and legal holidays) and shall return to and remain in custody during all other hours.

( ) (23) The defendant shall avoid all contact directly or indirectly with the following named individuals who may be considered alleged victims or potential witnesses except in the direct physical presence of his/her attorney in connection with the preparation of the defense ———

---

( ) (24) The defendant shall execute an agreement to forfeit the sum of ——— dollars ($———) and/or the following designated property: ———————

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upon failing to appear as scheduled by the Court or otherwise as required by this Order.

( ) (25) The defendant shall post with the Court the following indicia of ownership of the property designated above ———————————————— and/or ———% of the sum referred to above.

( ) (26) The defendant shall execute a bail bond with solvent sureties in the amount of ———————— dollars ($————————).

( ) (27) The defendant shall execute an appearance bond in the amount of ———————————— dollars ($————————) to be either fully or partially secured by the following individuals ———————— ———————— who shall execute the bond as sureties on behalf of the defendant, a deposit of cash in the amount of ———————— dollars ($————————) and/or other security approved by the Court, any cash deposit to be returned upon the Court's determination that the defendant has appeared as required.

( ) (28) The defendant shall surrender his or her passport to the Court to be held in the registry of the Court until the conclusion of the proceedings against the defendant.

( ) (29) The defendant shall obtain no passport during the pendency of the proceedings.

(✓) (30) Other additional conditions of release not specified above: Defendant shall be confined to premises of VOA and shall not be authorized to leave for any reason unless accompanied by Special Agent Dennis Bass.

Part III—Penalties, Forfeitures and Sanctions

1. *Failure to Appear.*

(a) A person commits an offense, if after having been released, he knowingly fails to appear before a Court as

required by conditions of release, or he knowingly fails to surrender for service of sentence pursuant to Court Order. If the defendant was released in connection with a charge, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction, for (1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more, the defendant shall be fined not more than $250,000.00 or imprisoned for not more than ten years, or both; (2) an offense punishable by imprisonment for a term of five or more years, but less than fifteen years, the defendant shall be fined not more than $250,000.00 or imprisoned for not more than five years, or both; (3) any other felony, the defendant shall be fined not more than $250,000.00 or imprisoned for not more than two years, or both; or (4) a misdemeanor, the defendant shall be fined not more than $100,000.00 or imprisoned for not more than a year, or both. Any term of imprisonment imposed shall be consecutive to the sentence of imprisonment for any other offense.

(b) If a person fails to appear before a Court as required, any person executing an appearance bond or a bail bond or executing an agreement to forfeit certain designated property, including money, upon the defendant's failure to appear as required, may suffer the forfeiture of said appearance or bail bond in the total amount of said bond as well as the forfeiture of any sum of money or property so designated to the United States.

2. *Offenses Committed While on Release.*

A person convicted of an offense committed while released shall be sentenced in addition to the sentence prescribed for the offense committed while on release to: (1) a term of imprisonment of not less than two years and not more than ten years if the offense is a felony; or (2) a term of imprisonment of not less than ninety days

and not more than one year if the offense is a misdemeanor. Any term of imprisonment shall be consecutive to any other sentence of imprisonment.

3. *Other Available Sanctions for Violation of Conditions of Release.*

A person who has been released and who had violated a condition of his release is subject to: (1) the immediate issuance of a warrant for the individual's arrest; (2) revocation of the individual's release; (3) an order for the individual's detention; and/or (4) subsequent prosecution for contempt of Court under 18 USC § 401, and if found to be in contempt may be fined, imprisoned or both.

4. *Obstruction of Justice.*

As a condition of release, the defendant has been directed not to commit any federal, state or local crime during the period of release. In this connection, the defendant's attention is directed to the following: (1) 18 USC § 1503—relating to the intimidation of witnesses, jurors and officers of the Court. Penalty—a fine of not more than $250,000.00 or imprisonment of not more than five years or both; (2) 18 USC § 1510—relating to obstruction of criminal investigations. Penalty—a fine of not more than $250,000.00 or imprisonment for not more than five years or both; (3) 18 USC § 1512—relating to tampering with a witness, victim or informant. Penalty—a fine of not more than $250,000.00 or imprisonment of not more than ten years or both or, if charged as a misdemeanor, a fine of not more than $250,000.00 or imprisonment of not more than one year or both; (4) 18 USC § 1513—relating to retaliating against a witness, victim or informant. Penalty—a fine of not more than $250,000.00 or imprisonment for not more than ten years or both.

Part IV—Acknowledgment by Defendant

I fully understand the methods and conditions of my release which have been set forth on this Order and the penalties, forfeitures and sanctions which are applicable in the event I violate any condition of release or fail to appear as required. I agree to comply with the terms of this Order and acknowledge receiving a copy of same. I promise to obey all conditions of release, to appear as required and to surrender for service of any sentence which may be imposed.

/s/ Ziya Koray

Defendant

c/o Volunteers of America, 4601 E. Monument Street

Address

Baltimore, MD 21205 276-5880

City & State Tele. No.

RELEASE ORDERED:

Date: 6/25/91

Location: Baltimore MD

/s/ Paul M. Rosenberg

United States Magistrate Judge

[Entered Oct. 25, 1991]

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

---

Case Number: R-91-0188

UNITED STATES OF AMERICA

*v.*

ZAYA KEMAL KORAY

---

**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

---

THE DEFENDANT:

☒ pleaded guilty to count 1.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| 18:1956(a)(1) | Attempting to conduct financial transaction in or affecting interstate commerce involving the proceeds of specified unlawful activity. | | |

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ Count(s) ———— (is) (are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $50.00, for count(s) 1, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully-paid.

Defendant's Soc. Sec. No.: 077-74-5721

Defendant's Date of Birth: 5/26/57

Defendant's Mailing Address:

Volunteers of America
4601 E. Monument St.
Baltimore, Md. 21205

Defendant's Residence Address:

_____

_____

October 22, 1991
Date of Imposition of Sentence

/s/ Norman P. Ramsey
Signature of Judicial Officer

NORMAN P. RAMSEY
U.S. DISTRICT JUDGE
Name & Title of Judicial Officer

October 25, 1991
Date

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 41 months.

☒ The court makes the following recommendations to the Bureau of Prisons: Defendant should be incarcerated in Danberry or Allenwood institutions.

☒ The defendant shall surrender to the United States marshall for this district,

☒ at 10:00 a.m. on November 25, 1991.

## RETURN

I have executed this judgment as follows:

_____

_____

Defendant VOLUNTARILY SURRENDERED on 11-25-91 to ALLENWOOD FEDERAL PRISON CAMP at MONTGOMERY, PA. 17752, with a certified copy of this judgment.

COPY OF THE J&C WAS MAILED ON 11-26-91

PATRICK T. CASEY
Warden

By /s/ [Illegible]
Legal Tech.

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☒ The defendant shall not possess a firearm or destructive device.

## STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

[Filed Oct. 15, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

---

No. 3: CV-92 1458

ZIYA K. KORAY

*v.*

FRANK SIZER, WARDEN, ALLENWOOD FEDERAL PRISON CAMP; UNITED STATES BUREAU OF PRISONS; ATTORNEY GENERAL OF THE UNITED STATES

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**MOTION UNDER 28 U.S.C. § 2241 FOR HABEAS CORPUS RELIEF**

Comes now the Petitioner, Ziya K. Koray, and requests this Honorable Court to grant habeas corpus relief under 28 U.S.C. § 2241 and to direct the United States Bureau of Prisons to credit Petitioner's sentence with the time that he served confined to the Volunteers of America halfway house in pre-trial and post-sentence confinement. As grounds for this motion, Petitioner states the following:

1) Petitioner is currently confined at the Allenwood Federal Prison Camp in Montgomery, Pennsylvania serving a federal sentence for money laundering in violation of 18 U.S.C. § 1956(a)(1). Petitioner has no further sentence to serve after completion of this federal sentence.

2) On June 18, 1991, Petitioner entered a plea of guilty to a one count criminal information charging him with attempting to conduct financial transactions in or affecting interstate commerce involving the proceeds of specified unlawful activity, in violation of 18 U.S.C.

§ 1956(a)(1). Petitioner was sentenced to forty-one months imprisonment on October 22, 1991.

3) Michael CitaraManis, Assistant Federal Public Defender for the District of Maryland, 100 S. Charles Street, Baltimore, Maryland 21201 represented Petitioner at his initial appearance. Warren Brown, Suite 909 Court Square Building, 200 E. Lexington Street, Baltimore, Maryland 21202 represented Petitioner at all subsequent proceedings in the district court.

3) Following his sentence, Petitioner filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit. This appeal, however, was voluntarily dismissed on May 5, 1992. Denise Benvenga, Assistant Federal Public Defender for the District of Maryland, 100 S. Charles Street, Suite 401, Baltimore, Maryland 21201 represented Petitioner on appeal.

4) Petitioner has not filed any other petitions or motions in federal court with respect to the judgment entered in this case.

5) On December 27, 1991, Petitioner requested the United States Bureau of Prisons to correct his sentence com[p]utation sheet to reflect time spent at the Volunteers of America halfway house.[1] That request was denied on January 10, 1992. Exhibit A.

6) On January 28, 1992, Petitioner filed a Request for Administrative Remedy. That request was denied on February 13, 1992. Exhibit B.

---

[1] On June 25, 1991, Petitioner was released under the Bail Reform Act of 1984 upon condition that he remain at the Volunteers of America, a halfway house. Petitioner remained at the halfway house until November 22, 1991, when he reported to Allenwood FCP to serve his sentence. While at the halfway house, Petitioner was required to remain there twenty-four hours a day and did not have work-release status. He was permitted to leave only by order of court to attend to specific medical needs. Petitioner had to abide by all of the facilities rules and regulations.

7) Petitioner then filed a Regional Administrative Remedy Appeal which was denied on April 3, 1992. Exhibit C.

8) Petitioner's final administrative appeal, made to National Inmate Appeals of the Federal Bureau of Prisons, was denied on June 1, 1992. Exhibit D.

9) Petitioner is entitled to credit against his sentence for the time that he served at the Volunteers of America because that time was spent in "official detention" under 18 U.S.C. § 3585. Several courts have rejected the Bureau of Prisons interpretation of "official detention" as time spent under a detention order and have ordered the Bureau of Prisons to credit inmates with time served in community confinement. *Mills v. Taylor*, 967 F.2d 1397 (9th Cir. 1992); *United States v. Davis*, 763 F. Supp. 638 (D.D.C. 1991); *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990). This court, in *United States v. Fernandez*, No. 89-234-33 (July 16, 1990) (1990WL102803), held that a defendant ordered to remain at a community correction center pre-trial must be given credit for that time. The court reasoned that the level of confinement associated with the center amounted to "official detention." Moreover, the court found that to deny the defendant credit for the time spent at the community treatment center while granting credit for those who have commenced their sentence would deny the defendant equal protection of the laws.

10) The amount of restrictions placed on Petitioner's liberty at the Volunteers of America halfway house were fundamentally no different than the restrictions placed against the defendants in the above-mentioned cases.

Accordingly, Petitioner requests that this Court order the Federal Bureau of Prisons to credit Petitioner for his time spent at the Volunteers of America.

WHEREFORE, Petitioner prays that the Court grant him all relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct, Executed on 09-27-1992.

(date)

/s/ Ziya Koray

(Signature of Petitioner)

**EXHIBIT A TO MOTION**
**FOR HABEAS CORPUS RELIEF**

DATE December 27, 1991

Ms. Opal Schlappi, Records Supervisor

(Name and title of officer)

SUBJECT: State completely but briefly the problem on which you desire assistance, and what you think should be done (Give details).

My com[p]utation sheet does not reflect post and pre-trial time spent in the Volunters of America(CCC) in Baltimore, Maryland. The computation sheet gives me credit from 4/23/91 to 6/25/91, which is time spent in county conefinement at Rockville, Md. I was then transferred to the CCC in Baltimore, Md; from 6/25/91 to 10/22/91. I was sentenced on 10/22/81 and returned to the CCC until 11/22/91.

I would appreciate a corrected computation sheet. Thank You.

NAME: Ziya Kemal Koray No.: 37880-053

Work assignment: Unicor Unit: B

NOTE: If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently. You will be interviewed, if necessary, in order to satisfactorily handle your request. Your failure to specifically state your problem may result in no action being taken.

DISPOSITION: (Do not write in this space)

DATE 01-10-92

We contacted Pre-trial services and based on the information we received, your stay at VOA in Baltimore was a

condition of release via Personal Recognizance or Unsecured Bond, and under those conditions, you are not entitled to credit for the period of time you were under the supervision of the Pre-trial services.

We will contact Ms. Skidmore, Pre-Trial Services to determine the status of your case after having been sentenced—were you continued on bond with the same conditions—this is the question we must have answered. Thank you.

01-13-92—We again contacted Ms. Skidmore and [she] advised that you were returned to the CCC after sentencing under the same conditions as when you were initially placed in the CCC—there are no provisions to give credit for this time. Thank you.

/s/ Opal Schlappi
Officer

/s/ Opal Schlappi
1-13-92

*ALY 1330.8—Attachment 1*
*July 22, 1991*

## *INFORMAL ATTEMPT TO RESOLVE PROBLEM*

*Procedures for application of Program Statement 1330.7, "Administrative Remedy", indicates an attempt to informally resolve a problem should be made prior to the submission of a BP-9.*

*This is the preferred course of action intended to minimize time and effort on the part of both staff and inmate and to maintain the effectiveness of the program.*

*Effective November 12, 1979, any Allenwood inmate submitting a BP-9 must state in writing the attempts made at an informal resolution by answering the questions below:*

1. *Name of Inmate and Registration Number:*

   KORAY, Ziya 37880-053 B5

2. *Nature of Complaint (State briefly what the problem is.):*

   My computation sheet does not reflect past and pretrial time spent in the Volunteers of America (CCC) in Baltimore, MD. It gives me credit from 04-23-91 to 06-25-91, which is time spent in county confinements in MD. I was then transferred to the CCC in Baltimore, and stayed there from 06-25-91 to 10-22-91. I was sentenced on 10-22-91 and returned to the CCC again until 11-22-91.

3. *Efforts Made to Resolve the Problem (Include contacts with staff (by name), use of request slips, etc.):*

   I filed inmate request form to Ms. Opal Schlappi (Records Supervisor) on December 27, 1991.

4. *Counselor's Comments (Include efforts made to resolve informally):*

   I spoke with the Records Dept on 1/23/92 and they stated that you are not Eligible for credit during these

time and they Explained that to you in a cap-out Response date 1/13/92 (See attached I have also attached Page 3 of [Program] Statement 5880[.]24 For Your Review

/s/ M. Fetzer
Correctional Counselor's
Signature

1/28/92
Date of Response

**EXHIBIT B TO MOTION FOR HABEAS CORPUS RELIEF**

U.S. Department of Justice

Federal Bureau of Prisons

Request For Administrative Remedy

Type or use ball-point pen. If attachments are needed, submit four copies. Additional instructions on reverse.

From: Koray, Ziya K.
Last Name, First Middle Initial

37880-053
Reg. No.

B5
Unit

FPC Allenwood
Institution

Part A—INMATE REQUEST

My computation sheet does not reflect past and pre-trial time spent in the Volunteers of America (CCC) in Baltimore, MD. It gives me credit from 04.23.1991 to 06.25.1991, which is time spent in county confinements in MD. I was then transferred to the CCC in Baltimore, and stayed there from 06.25.1991 to 10.22.91. I was sentenced on 10.22.91 and returned to the CCC again until 11.22.91. I didn't even receive credit for the time spent in CCC after the sentencing. I would appreciate a corrected computation sheet. Thank you.

/s/ Ziya Koray

Date

Signature of Requester

Part B—RESPONSE

You have asked that your computation sheet reflect post and pretrial time spent in the Volunteers of America (Community Corrections Center) in Baltimore, Maryland.

In accordance with established procedures provided within Program Statement 5880.24, *Sentence Computation, Jail Time Credit Under 18 USC 3568*, "Time spent in residence in a *residential community center* (or a community based program located in a Metropolitan Correctional Center or jail) under the provisions of 18 USC 3146 as a condition of bail or bond, including the "Pretrial Services" program (18 USC 3152-3154), is not creditable as jail time since the degree of restraint provided by residence in a community center is not sufficient restraint to constitute custody within the meaning or intent of 18 USC 3568. Also, a "highly restrictive" condition of bail or bond, such as requiring the defendant to report daily to the U.S. Marshal, is not considered as time in custody. However, time spent in a *jail-type facility* (not including a community based program located in a Metropolitan Correctional Center or jail) as a condition of bail or bond is creditable as jail time because of the greater degree of restraint."

Accordingly, your appeal is denied.

/s/ Patrick T. Casey

February 13, 1992 — PATRICK T. CASEY, Warden

DATE — Warden or Regional Director

If dissatisfied with this response, you may appeal to the Regional Director. Your appeal must be received in the Regional Office within 20 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 25031-F1

Part C—RECEIPT

Return to: _____

CASE NUMBER: 25031-F1

**EXHIBIT C TO MOTION FOR HABEAS CORPUS RELIEF**

U.S. Department of Justice

Federal Bureau of Prisons

Regional Administrative Remedy Appeal

Type or use ball-point pen. If attachments are needed, submit four copies. One copy of the completed BP-DIR-9 including any attachments must be submitted with this appeal.

From: Koray, Ziya K.
Last Name, First, Middle Initial

37880-053
Reg. No.

B5
Unit

Allenwood
Institution

Part A—REASON FOR APPEAL

My computation sheet does not reflect past and pre-trial time spent in the Volunteers of America (CCC) in Baltimore, Maryland. It gives me credit from 04.23.1991 to 06.25.1991, which is the time spent in county confinements in Maryland. I was then transferred to the CCC in Baltimore and stayed there from 06.25.1991 to 10,22.1991. I was sentenced on 10.22.1991 and returned to the CCC again until 11.22.1991. I was not allow to leave the C.C.C. without Court Order, and I did not release for employment and schooling. I didn't even receive a credit for the time spent in the C.C.C. after the

sentencing. I would appreciate, if you would reconsider my request. Thank you in advance.

| 02.03.1992 | /s/ Ziya Koray |
|---|---|
| DATE | SIGNATURE OF REQUESTOR |

Part B—RESPONSE

In your Administrative Remedy, you request that your sentence be credited with time spent at the Volunteers of America (VOA) Community Corrections Center. Specifically, you request that from June 25, 1991, to October 22, 1991, time spent on release at VOA, be credited to your sentence.

You were arrested by federal agents on April 23, 1991, for attempting to conduct a financial transaction in or affecting commerce involving proceeds of an unlawful activity and detained. On June 25, 1991, you were released from detention by the U.S. Magistrates pursuant to 18 U.S.C. 3141 and 3142. The release specified certain conditions that you reside at VOA under U.S. Pretrial Service supervision.

Title 18 U.S.C. 3585 and Operations Memorandum 261-91 (5883), *Credit for Time In Custody Under 18 U.S.C. 3585(b)*, states that credit toward the service of a sentence will be awarded for time spent in official detention prior to the date the sentence starts.

Your sentence has been credited with time spent in detention from April 23, 1991, to June 25, 1991, when you were released from detention. The time from June 26, 1991, to October 22, 1991, at VOA on a condition of release was not spent in official detention. Your sentence began on November 25, 1991, when you surrendered to the Bureau of Prisons, FPC Allenwood, for the service of your sentence. Your sentence has been correctly computed.

Accordingly, your appeal is denied. If dissatisfied with this response, you may appeal to the General Counsel, Federal Bureau of Prisons. Your appeal must be received in the Administrative Remedies Branch, Federal Bureau of Prisons, 320 First Street NW, Washington, DC 20534, within 30 calendar days of the date of this response.

G. C. Wilkinson
G. C. WILKINSON
Regional Director

Date 4-3-92

If dissatisfied with this response, you may appeal to the General Counsel. Your appeal must be received in the General Counsel's Office within 30 calendar days of the date of this response.

ORIGINAL: RETURN TO INMATE

CASE NUMBER: 25031-R1

Part C—RECEIPT

CASE NUMBER: 25031-R1

**EXHIBIT D TO MOTION FOR HABEAS CORPUS RELIEF**

ADMIN. REM. 25031-A1

You request prior custody credit from June 25, 1991 through November 24, 1991 for time spent in a Community Treatment Center as a condition of bond.

On April 23, 1991, you were arrested and remanded to custody where you remained until your release on bond on June 25, 1991. The U.S. District Court for the District of Maryland sentenced you to a term of 41 months imprisonment on October 22, 1991. At the time of sentencing, the court allowed you to remain on bond until November 25, 1991, at which time you surrendered to FPC Allenwood, Pennsylvania for service of your 41-month sentence.

Title 18 USC § 3141—3143 allows the court to prescribe restrictions on persons released to the community on bond, to reasonably assure the appearance of the person as required by the court. The conditions placed on you by the court while you were released from detention on bond are not the same as conditions placed on a defendant who remains in official detention. Official detention is defined as time spent under a detention order. This also includes time spent under a *detention order* when the court has recommended placement in a less secure environment. A defendant under these circumstances remains in "official detention", subject to the discretion of the U.S. Attorney General and the U.S. Marshals Service with respect to the place of detention. Those defendants placed in a program and residence as a condition of detention are subject to removal and return to a more secure environment at the discretion of the U.S. Attorney General and the U.S. Marshals Service, and further, remain subject to prosecution for escape for any unauthorized absences from the program or residence.

You were not similarly situated with those placed in a program or residence as a *condition of detention,* as you were *released* from detention on bond with a condition for residence at a community treatment center. Time spent in residence as a condition of bond is *not* creditable as prior custody credit. To grant credit for time *released* from detention on bond, would be contrary to the intent of Title 18 USC § 3585(b), regardless of the conditions placed on you as a result of the bond. Your request is denied.

DATE 6-1-92

/s/ for Robert J. [Illegible]
J. M. RALPH
Administrator
National Inmate Appeals

SUPREME COURT OF THE UNITED STATES

---

No. 94-790

JANET RENO, Attorney General, ET AL., PETITIONERS

*v.*

ZIYA K. KORAY

---

**ORDER ALLOWING CERTIORARI**

Filed: January 13, 1995

---

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 23, 1995. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, March 23, 1995. Rule 29.2 does not apply.

January 13, 1995

☆ U. S. GOVERNMENT PRINTING OFFICE, 1995 387147 20038

SUPREME COURT, U.S.
FILED
FEB 22 1995
OFFICE OF THE CLERK

(3)

No. 94-790

# In the Supreme Court of the United States

OCTOBER TERM, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

ZIYA K. KORAY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
*Solicitor General*

JO ANN HARRIS
*Assistant Attorney General*

MICHAEL R. DREEBEN
*Deputy Solicitor General*

MIGUEL A. ESTRADA
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## QUESTION PRESENTED

Section 3585 of 18 U.S.C. provides that a defendant generally must "be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." The question presented is whether a federal prisoner must receive credit on his sentence under Section 3585 for time when he was released on bail pursuant to the Bail Reform Act of 1984.

## PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following are petitioners in this Court: United States Bureau of Prisons and Frank Sizer, warden, Allenwood Federal Prison Camp, Allenwood, Pennsylvania.

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# In the Supreme Court of the United States

OCTOBER TERM, 1994

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No. 94-790

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

ZIYA K. KORAY

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 21 F.3d 558.

### JURISDICTION

The judgment of the court of appeals was entered on April 25, 1994. A petition for rehearing was denied on June 17, 1994. Pet. App. 29a-30a. On September 8, 1994, Justice Souter extended the time within which to file a petition for a writ of certiorari

to and including October 15, 1994. *Id.* at 31a. On October 11, 1994, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including November 1, 1994. *Id.* at 32a. The petition for a writ of certiorari was filed on November 1, 1994, and was granted on January 13, 1995. J.A. 37. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 3585 of Title 18 provides:

> **Calculation of a term of imprisonment**
>
> (a) **Commencement of sentence.**—A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.
>
> (b) **Credit for prior custody.** A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences—
>
> > (1) as a result of the offense for which the sentence was imposed; or
> >
> > (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;
>
> that has not been credited against another sentence.

## STATEMENT

1. On April 23, 1991, respondent was arrested for laundering monetary instruments, in violation of 18 U.S.C. 1956(a)(1). On June 18, 1991, he entered a guilty plea to that offense in the United States District Court for the District of Maryland. On June 25, 1991, a federal magistrate judge ordered respondent released on bail pending sentencing on condition that respondent reside at a Volunteers of America community treatment center. On October 21, 1991, the district court sentenced respondent to 41 months' imprisonment. Respondent remained at the Volunteers of America facility until November 25, 1991, the date on which he was ordered to surrender for service of his sentence. Respondent then reported to Allenwood Federal Prison Camp in Pennsylvania. Pet. App. 2a.

Invoking Bureau of Prisons (BOP or Bureau) administrative procedures, respondent sought credit against his sentence for the 150 days that he spent at the community treatment center between June 25 and November 25, 1991. Relying on its established policy, BOP declined to grant the requested credit. After exhausting his administrative remedies, respondent filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania seeking credit for the time he spent in the community treatment center. The district court denied the petition, finding that respondent's stay at the community treatment center did not constitute "official detention" within the meaning of 18 U.S.C. 3585(b), which governs credit for time spent in detention before the commencement of a sentence. Pet. App. 25a-28a.

2. The court of appeals reversed. Pet. App. 1a-24a. The court acknowledged that, with the exception of the Ninth Circuit, "most [courts of appeals] have concluded that section 3585 * * * does not require the Bureau to credit presentenced defendants whose bail conditions allowed them to be confined outside of Bureau of Prison[s] facilities." *Id.* at 7a. The court declined, however, to defer to BOP's view that the phrase "official detention" in Section 3585(b) does not include restrictive conditions of bail. The court explained that the statutory language need not be read "as if it provided 'official detention *by the Attorney General or the Bureau of Prisons*,' " since "there is nothing in the statute which requires or suggests that a defendant must be under the detention of the Bureau" and "[a] court may 'detain' a person as 'official[ly]' as the Attorney General." Pet. App. 13a-14a.

The court also found that the Bureau's interpretation of the statute was not worthy of deference because it appears in a "Program Statement" rather than in "published regulations subject to the rigors of the Administrative Procedure[] Act, including public notice and comment." Pet. App. 9a. Finally, the court placed considerable weight on its belief that BOP followed a "functional" approach to the credit issue under the predecessor statute, 18 U.S.C. 3568 (repealed). According to the court, that functional analysis focused on the restrictiveness of the bail conditions placed on a defendant, and, if utilized here, might have allowed respondent to obtain credit for his stay at the community treatment center. Pet. App. 9a-13a.

The court concluded that " 'official detention' for purposes of credit under 18 U.S.C. § 3585 includes

time spent under conditions of jail-type confinement." Pet. App. 23a. Although the court did not define that concept with precision, it believed that its approach would not be difficult to administer, because "only a small percentage of federal defendants are released to a halfway house," and because the Bureau had experience with the different but related functional approach to Section 3585(b) adopted by the Ninth Circuit. Pet. App. 21a-22a. The court remanded the case to the district court to determine whether respondent was in "jail-type" confinement during the time that he was at the community treatment center. *Id.* at 24a. Subsequently, respondent was released pending further proceedings in the court of appeals and the district court. *Id.* at 51a.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3585 of Title 18, entitled "[c]alculation of a term of imprisonment," is the federal statute that governs when a federal sentence of imprisonment is deemed to begin, and whether credit toward the sentence must be awarded for any time the prisoner spent in "official detention" before the sentence began. The Bureau of Prisons is the agency charged with administering that statute. See *United States* v. *Wilson*, 112 S. Ct. 1351 (1992). The question in this case is whether Section 3585 of Title 18 requires the Bureau of Prisons to grant credit toward a sentence of imprisonment for time during which a defendant was released on bail, but was required to reside at a community treatment center as a condition of bail.

Most courts of appeals have agreed with the Bureau's view that restrictive conditions of bail do not amount to "official detention" within the meaning of

Section 3585(b).[1] In *Mills* v. *Taylor*, 967 F.2d 1397 (1992), the Ninth Circuit departed from that approach and concluded that "official detention" includes any conditions that "approach * * * incarceration." *Id.* at 1400. In this case, the Third Circuit, while stating that it will "not go as far as does the Ninth Circuit," concluded that the Bureau is required to grant credit to a defendant whose release on bail was attended by conditions amounting to "jail-type confinement." Pet. App. 23a. In our view, the Third Circuit erred in rejecting the Bureau's interpretation. The Bureau's approach is supported by the text of Section 3585(b) and related sentencing provisions, the history of Section 3585(b), and principles of administrative deference.

A. Section 3585(b) does not define the phrase "official detention," but related statutory provisions indicate that Congress used that phrase to refer only to incarceration in a penal or correctional facility, where a defendant is under the control of federal or

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[1] See *Moreland* v. *United States*, 968 F.2d 655 (8th Cir.) (en banc) (time spent in halfway house not creditable), cert. denied, 113 S. Ct. 675 (1992); *United States* v. *Edwards*, 960 F.2d 278, 282-283 (2d Cir. 1992) (home confinement not creditable); *Pinedo* v. *United States*, 955 F.2d 12, 14 (5th Cir. 1992) (per curiam); *United States* v. *Becak*, 954 F.2d 386, 387-388 (6th Cir.) ("physical incarceration [required] to receive credit for presentence detention"), cert. denied, 112 S. Ct. 2286 (1992); *United States* v. *Zackular*, 945 F.2d 423, 425 & n.2 (1st Cir. 1991) (home confinement not creditable); *United States* v. *Insley*, 927 F.2d 185, 186 (4th Cir. 1991) (no credit for home confinement, because only "full physical incarceration" satisfies statutory requirement); *United States* v. *Woods*, 888 F.2d 653, 655-656 (10th Cir. 1989) (halfway house confinement not creditable), cert. denied, 494 U.S. 1006 (1990).

state correctional authorities. The phrase does not include halfway house "confinement" during which the defendant is not subject to summary removal and reassignment to a more secure environment at the discretion of correctional authorities.

First, the Bail Reform Act of 1984 is the statute that authorizes pre-sentence restraints on liberty, and under that statute "detention" means "confinement in a corrections facility." 18 U.S.C. 3142(i)(2). The bail statute is especially significant because it was enacted in the same statute as the Sentencing Reform Act of 1984, of which Section 3585 was a part. Second, Congress's use of the phrase "official detention facility" in Section 3585(a) to refer to the place where the defendant will serve his sentence confirms the Bureau's interpretation, because related statutes make clear that a sentence of imprisonment may be served only in a "penal or correctional facility" where the prisoner is subject to the control of federal or state correctional authorities. 18 U.S.C. 3621(b).

Other statutes also make clear that Congress did not consider the limitations on respondent's freedom of movement as a condition of bail to constitute "official detention." When Congress used the term "official detention facility" in federal sentencing statutes, such as 18 U.S.C. 3623, it contemplated facilities that are under the supervision of prison authorities. Moreover, the court of appeals' rule undermines one of the principal goals of the Sentencing Reform Act—the reduction of unwarranted sentencing disparities. To calculate credit under the court of appeals' amorphous standard, hundreds of different district judges across the country will be asked to review the Bureau's determinations in light of the restrictiveness of particular bail bonds. That process will inevitably produce conflicting results.

B. The legislative history of Section 3585 also supports the view that prisoners who are "released" on bail are not entitled to pre-sentence credit. The statute that preceded Section 3585 was enacted as part of a significant revision of bail practices, and it was based on congressional concern that prisoners who could not obtain release on bail should at least receive credit for the time spent in the custody of the Attorney General. By the time Congress enacted Section 3585 in 1984 (when it again revised bail practices), the courts of appeals had uniformly held that prisoners released on bail were not entitled to credit under the predecessor statute. There is no indication that Congress intended to change that rule, and, as this Court previously stated in construing Section 3585(b), "[i]t is not lightly to be assumed that Congress intended to depart from a long established policy" followed under the predecessor provision. *United States* v. *Wilson*, 112 S. Ct. at 1355.

C. Finally, the court of appeals erred in refusing to defer to the Bureau of Prisons' interpretation of a statute the Bureau is charged with administering. The court of appeals incorrectly believed that the Bureau has followed inconsistent approaches to the credit issue, and that the Bureau's views are too informal to warrant deference. Because the Bureau's considered interpretation of Section 3585(b) is reasonable, the court of appeals was required to defer to it, even if the language of that statute would bear a different reading. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

## ARGUMENT

### SECTION 3585 DOES NOT REQUIRE THE BUREAU OF PRISONS TO AWARD A PRISONER CREDIT FOR TIME WHEN HE WAS RELEASED ON BAIL PURSUANT TO THE BAIL REFORM ACT OF 1984

#### A. The Text Of Section 3585 And The Surrounding Statutory Framework Demonstrate That Credit May Not Be Granted For Time Spent In A Community Treatment Center As A Condition Of Bail

Section 3585(b) states that a defendant "shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention" before beginning service of his sentence. Section 3585(b) does not define the phrase "official detention." That phrase, however, derives a particular meaning from related statutory provisions that authorize presentence restraints on a defendant's liberty. The provisions governing "detention" by the Attorney General, see 18 U.S.C. 3142, 3143 (1988 & Supp. V 1993), and the detailed statutory framework governing "post-sentence administration" found in Chapter 229 of Title 18, see 18 U.S.C. 3586, establish that the "official detention" contemplated by Section 3585(b) is incarceration in a facility under the control of correctional authorities.

1. The Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.*, is the body of law that authorizes restraints on a defendant's liberty, both before trial, see 18 U.S.C. 3142(a), and while the defendant "is awaiting imposition or execution of sentence." 18 U.S.C. 3143(a) (Supp. V 1993). That Act therefore provides a natural complement to Section 3585(b)'s provision of credit for time spent in "official detention" before the sentence commenced.

The Act provides a court with two choices: to release a defendant on bail or to order him detained. A defendant who is admitted to bail is "released," even when his bail includes specific conditions limiting his freedom of movement, such as residence in a community treatment center. See 18 U.S.C. 3142(c)(1)(B)(x). A defendant is "detained" only when he is denied bail—a ruling that results in his being "committed to the custody of the Attorney General for confinement in a corrections facility" pending trial and sentence. 18 U.S.C. 3142(i)(2). Thus, the only "detention" that a defendant may suffer "official[ly]" by virtue of a federal court order is detention of the type contemplated by the Bail Reform Act of 1984—*i.e.*, "confinement in a corrections facility."

The common origin of Section 3585(b) and of the statutory provisions governing bail provides further evidence that Section 3585(b) should be construed in light of the bail provisions. Congress enacted both the bail provisions and Section 3585(b) as part of the same statute, the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976.[2] That legislation worked a broad and far-reaching reform of bail and sentencing practices. As this Court recognized in resolving another controversy that resulted from the same reforms, Congress must have been aware of the definitions it gave to statutory

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[2] The provisions of the Comprehensive Crime Control Act of 1984 relating to bail are known as the Bail Reform Act of 1984. Pub. L. No. 98-473, Tit. II, ch. I, 98 Stat. 1976. The provisions of the Act relating to sentencing, including the credit provision at issue here, are known as the Sentencing Reform Act of 1984. Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987.

terms in the "related legislative enactments" and must have "legislated with reference to [them]." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 407-408 (1991). That close relationship among the bail and credit provisions therefore "leads to the conclusion that 'official detention' means incarceration." *United States* v. *Becak*, 954 F.2d 386, 388 (6th Cir.), cert. denied, 112 S. Ct. 2286 (1992); accord *Moreland* v. *United States*, 968 F.2d 655, 662 (8th Cir.) (Loken, J., concurring), cert. denied, 113 S. Ct. 675 (1992).

Respondent contends (Br. in Opp. 14) that the bail statute's understanding of "detention" should not inform the interpretation given to Section 3585(b), because in certain circumstances the Bureau grants credit for time spent in state custody—when the prisoner is not in the custody "of the Attorney General" as contemplated by the Bail Reform Act of 1984. That would occur, for example, when a defendant is originally arrested and held without bail on state-law charges that ultimately are dismissed, but when the conduct underlying those charges then forms the basis for a federal conviction and sentence of imprisonment.[3] That observation, however, does not undercut our essential point: that the logical inference from the language of the Bail Reform Act of 1984 is that Congress understood the term "detention" to mean penal safekeeping by correctional offi-

[3] Because Section 3585(b) expressly prohibits credit for time "that has * * * been credited against another sentence," an award of credit for time spent in state custody is rare. Thus, for example, if the state proceedings resulted in conviction and a jail sentence, time spent in state custody would not be creditable toward a federal sentence, unless state authorities did not credit the defendant's pre-trial incarceration toward the state sentence.

cials, not private supervision, however restrictive, of conditions of release.

2. The Bureau of Prisons' view that a defendant may receive credit under Section 3585(b) only for a period of custody spent under the control of federal or state correctional authorities is also confirmed by other provisions of Title 18 that govern the implementation of federal sentences.[4]

Section 3585(a), which governs when a federal sentence is deemed to "commence," is especially significant. That Section provides that a federal sentence commences when the defendant is received for transportation to or arrives at "the official detention facility at which the sentence is to be served." Section 3621(b) of Title 18 in turn provides that a federal sentence of imprisonment may be served at "any available penal or correctional facility" that is "designate[d]" by the Bureau of Prisons, "whether maintained by the Federal Government or otherwise." The phrase "official detention facility" in Section 3585(a) therefore refers to a correctional facility designated by the Bureau for the service of federal sentences, and where the prisoner remains at the discretion of correctional authorities who "may * * * direct [his] transfer * * * from one penal or correctional facility to another." 18 U.S.C. 3621(b).[5]

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[4] Section 3586 of Title 18 provides that "[t]he implementation of a sentence of imprisonment is governed by the provisions of subchapter C of chapter 229." Subchapter C governs where a sentence of imprisonment may be served, the circumstances under which a prisoner serving a sentence may engage in paid employment while continuing in "official detention," the date of the prisoner's release, and other matters. See 18 U.S.C. 3621 *et seq.*

[5] That the phrase "official detention" means incarceration is also confirmed by the history of Section 3585(a). The

That interpretation of Section 3585(a) is confirmed by other provisions governing the administration of federal sentences. For example, Sections 3622(b) and 3622(c) of Title 18 provide that a prisoner serving a federal sentence of imprisonment may participate in training or employment "while continuing in official detention at the penal or correctional facility." Section 3623 provides that a prisoner serving a federal sentence may be transferred to "an official detention facility" operated by a State when the prisoner faces further charges in that State and the State requests the transfer. Because basic canons of construction suggest that the words "official detention" should bear the same meaning in subsections (a) and (b) of Section 3585 and in the related sentencing statutes, see *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992); see also *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1169 (1993), credit for time "spent in official detention" under Section 3585(b) is available only to a defendant who was detained in a "penal or correctional facility," 18 U.S.C. 3621(b), and was subject to the control of state or federal penal authorities.

Moreover, when restrictions on liberty such as those placed on respondent are made part of a federal sentence, they are not considered part of a sentence of *imprisonment*. Congress has provided that such community confinement may be ordered when the defendant is sentenced to *probation*, a type of sentence that differs "fundamentally," *United States* v. *Grand-*

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phrase "official detention facility" replaced references in a predecessor statute to "penitentiary, reformatory, or jail" and to "a jail or other place of detention." See 18 U.S.C. 3568 (1982) (repealed). There is no indication that Congress intended a substantive change when it replaced those two phrases with a single descriptive phrase.

*erson*, 114 S. Ct. 1259, 1264 (1994), from imprisonment and is reserved for less grave offenses. See 18 U.S.C. 3563(b)(10), (12), (14) & (20); see also *United States* v. *Granderson*, 114 S. Ct. at 1266 (sentence of probation "ordinarily reflects the judgment that the offense and offender's criminal history were not so serious as to warrant imprisonment"); Sentencing Guidelines §§ 5F1.1 & 5F1.2.[6] There is therefore every indication that Congress did not conceive of the type of restraints on liberty placed on respondent as "imprisonment," but that it instead regarded those restraints as equivalent to more lenient probationary sentences. It would be anomalous to interpret a statute designed, as its title indicates, to govern the "[c]alculation of a term of imprisonment" to require credit for restrictions on liberty that are not "imprisonment" as that term is used in federal sentencing statutes.

3. The rule adopted by the court of appeals is also inconsistent with the more general goals of the Sentencing Reform Act, of which Section 3585(b) is a part. In enacting the Sentencing Reform Act, Congress was concerned primarily with the "great variation among sentences imposed by different judges upon similarly situated offenders." *Mistretta* v. *United States*, 488 U.S. 361, 366 (1989). Congress

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[6] Congress provided that that type of community confinement may also be imposed as a condition of "supervised release," see 18 U.S.C. 3583(d) (incorporating by reference discretionary conditions of probation), which like probation is a form of supervision. Unlike probation, which is an alternative to imprisonment, a period of supervised release is an additional penalty that must be served "after imprisonment." See 18 U.S.C. 3583(a).

created the Sentencing Commission to devise a system of uniform sentencing guidelines that would bring greater regularity and uniformity to sentencing by "reducing sentence disparities." *Id.* at 367; see also 18 U.S.C. 3553(a)(6).

The rule adopted by the court of appeals undermines that goal. That rule requires the Bureau to investigate and analyze the conditions of each defendant's bail bond to determine whether he suffered "jail-type" restraints on his liberty. The Bureau would be required to make that judgment on the basis of information kept by centers owned and operated by private entities, such as the Volunteers of America facility at issue in this case. The records of those private entities are not available to BOP as a matter of right, and any information those entities provide to BOP is therefore less verifiable than materials provided by the "law enforcement agenc[ies]," Pet. App. 49a, on which the Bureau ordinarily relies for documentation in dealing with credit issues. Moreover, even when there is no reason to doubt the reliability of the information furnished, that information may not significantly aid the Bureau in performing the task required by the decision below, because the "jail-type restraints" standard adopted by that court is elusive and amorphous.

The decision below also requires a federal habeas court to grant a hearing to a prisoner who receives an adverse determination from the Bureau, and who alleges that the conditions of his bail were "jail-like." Pet. App. 23a-24a. There is no reason to believe that federal habeas courts, any more than the Bureau of Prisons, will be able to perform that inquiry with ease. As the Seventh Circuit has noted, whether par-

ticular conditions of confinement are "sufficiently like prison to be treated the same * * * is not a question susceptible of rational determination, at least by tools of inquiry available to judges." *Ramsey* v. *Brennan*, 878 F.2d 995, 996 (1989). Indeed, there is no single set of objective criteria that describes all facilities where a defendant might serve a federal sentence of imprisonment. The Bureau of Prisons runs a number of correctional facilities that subject inmates to varying degrees of restraint, from maximum security penitentiaries to prison camps. The only factors that unify them are that their inmates are under the direct control of correctional personnel, are subject to summary reassignment to any other facility within the system, and are subject to the Bureau's disciplinary procedures. See *Randall* v. *Whelan*, 938 F.2d 522, 525 (4th Cir. 1991).

Moreover, the difficulty of comparing the Bureau's diverse correctional facilities with the restraints associated with community treatment centers is compounded by the fact that "[t]he programs and rules of residential treatment centers vary dramatically with each institution," and courts will therefore face "myriad combinations of restrictions." *Randall* v. *Whelan*, 938 F.2d at 525-526. Because "[n]o obvious rule informs * * * how to weigh[] a midnight curfew against one beginning at eight in the evening, or a five-day-a-week regime against one lasting seven days," *id.* at 526, the end result will be to "mire the judiciary in a swamp of factual and circumstantial details that would likely produce inconsistent and standardless decisions," *id.* at 525.

Some of those conflicts could be resolved over time through the appellate process. But a system based on case-by-case habeas adjudication of the compara-

tive restrictiveness of particular bail bonds is likely to be far more cumbersome, and produce less uniformity in the end, than a system of administrative determinations governed by uniform rules that are applied by the agency consistently throughout the country.[7] It is difficult to believe that, as part of legislation designed to bring regularity and uniformity to sentencing practices, Congress intended to create a regime that encourages unwarranted disparities in the amount of time that similarly situated prisoners actually spend in jail.

### B. The History Of Section 3585 Demonstrates That Congress Intended The Credit Provisions To Benefit Only Those Defendants Held In Prison Without Bail

The history of the credit provision underscores its close ties to bail determinations. That history confirms that Congress did not anticipate that credit

---

[7] The difficulty of achieving uniform results under the type of functional approach suggested by the court of appeals is highlighted by its own decision. In joining the only court to embrace a functional approach (and to reject the Bureau's view), the court of appeals emphasized that *its* functional approach does "not go as far" as the Ninth Circuit's. Pet. App. 23a. Similar circuit conflicts can be expected to arise if some form of functional approach to the credit issue becomes a national rule, because the contours of the rule will become clear only after considerable litigation. That result would be especially disruptive to prison administration, because the Bureau runs a national prison system in which inmates are routinely transferred among correctional facilities located in different circuits to maintain security and population balance. The Bureau could therefore correctly deny credit under the law governing a prisoner's first place of incarceration only to find itself defending a habeas challenge based on the different legal principles of another circuit where that prisoner may later be incarcerated.

would be awarded to a prisoner who was not actually incarcerated in a correctional facility before his sentence commenced.

1. The original credit provision was enacted in 1932 to clarify when a federal sentence began to run, in cases in which BOP had transferred the prisoner from one place of confinement to another. See 18 U.S.C. 709a (1934) (credit for time spent in jail awaiting transfer). The statute "retained th[at] limited thrust until 1960, when Congress sought to clarify whether, under statutes requiring the imposition of a minimum mandatory sentence, the court was free to give recognition to the time a defendant had spent in jail for want of bail." *Ochoa* v. *United States*, 819 F.2d 366, 371 (2d Cir. 1987); see also *United States* v. *Peterson*, 507 F.2d 1191, 1193 (D.C. Cir. 1974) (per curiam). Accordingly, in 1960 Congress required the Attorney General to grant a convicted defendant credit against his sentence "for any days spent *in custody* prior to the imposition of sentence * * * *for want of bail set* for the offense under which sentence was imposed." Act of Sept. 2, 1960, Pub. L. No. 86-691, § 1(a), 74 Stat. 738 (emphasis added).

2. Congress returned to the credit statute in the Bail Reform Act of 1966, Pub. L. No. 89-465, § 4, 80 Stat. 217 (codified at 18 U.S.C. 3568 (repealed)), when it deleted the statutory reference to "want of bail" and made credit available for offenses that did not call for a mandatory minimum sentence. The Committee Report that accompanied that legislation indicates that the express reference to bail was deleted to clarify that credit should be available for offenses made "nonbailable" by law, and also in cases when the defendant was "not released for some rea-

son other than lack of bail." S. Rep. No. 750, 89th Cong., 1st Sess. 21-22 (1965).[8] In light of that explanation, the lower courts interpreted the 1966 Act to require credit only for defendants who were imprisoned before trial, and rejected claims that onerous conditions of bail could amount to "custody" under the statute. As the D.C. Circuit explained,

> the purpose of Congress was to benefit those who were not released; there was no intention to extend credit to those who were released.

---

[8] As amended in 1966, the credit statute provided:

> § 3568. **Effective date of sentence; credit for time in custody prior to the imposition of sentence**
>
> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.
>
> If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> No sentence shall prescribe any other method of computing the term.

18 U.S.C. 3568 (1982) (repealed). Section 3568 remains in force with respect to sentences imposed before November 1, 1987.

> Had Congress, in amending the statute, intended to give credit to those who were released pending trial or appeal we think Congress would have said so in plain language; certainly there would have been some discussion of this novel proposal in the reports on the legislation.

*United States* v. *Peterson*, 507 F.2d at 1193. The court thus concluded that " 'in custody' * * * means detention or imprisonment in a place of confinement and does not refer to the stipulations imposed when a defendant is at large on conditional release." *Id.* at 1192. See also *Ortega* v. *United States*, 510 F.2d 412, 413 (10th Cir. 1975) (per curiam); *Polakoff* v. *United States*, 489 F.2d 727, 730 (5th Cir. 1974) (Wisdom, J.).

3. That was the state of the law when the credit statute took its current form in 1984. Indeed, until a divided panel of the Ninth Circuit reached a contrary conclusion in *Brown* v. *Rison*, 895 F.2d 533 (1990)—six years *after* enactment of the Sentencing Reform Act—"all of the circuits that ha[d] considered the matter ha[d] concluded that 'custody' for purposes of section 3568" did not "include time spent while released on bail pending trial * * * or pending appeal." *Mieles* v. *United States*, 895 F.2d 887, 888 (2d Cir. 1990); see also *Brown* v. *Rison*, 895 F.2d at 537-538 (Wallace, J., dissenting). There is no indication that Congress, in rewording the credit provision as part of the Comprehensive Crime Control Act of 1984, disagreed with the then-unanimous weight of authority that denied credit to defendants who had secured their release on bail. Cf. *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation"). Rather, as this Court previ-

ously stated in construing Section 3585(b), "[i]t is not lightly to be assumed that Congress intended to depart from a long established policy" followed under the predecessor provision. *United States* v. *Wilson*, 112 S. Ct. 1351, 1355 (1992). While Congress in 1984 did "replace[] the term 'custody' with the term 'official detention,'" *ibid.*, the most plausible explanation for Congress's use of the "detention" formulation in Section 3585(b) was to conform the credit provision to the nomenclature used in other sentencing provisions, see, *e.g.*, 18 U.S.C. 3585(a), 3623, and in the Bail Reform Act of 1984.[9]

### C. The Court Of Appeals Erred In Failing To Defer To BOP's Reasonable Interpretation Of Section 3585

While the most natural reading of the phrase "official detention" in Section 3585(b) is that it refers to the status of a person who has been denied bail, the most that can be said of the court of appeals' analysis is that the language enacted by Congress *could* bear the functional interpretation adopted by that court, "not that it cannot bear the interpretation adoped by" the Bureau. *Sullivan* v. *Everhart*, 494

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[9] As the court below recognized, Pet. App. 12a-13a, every court of appeals to consider the question has held that the phrase "official detention" in Section 3585(b) has the same meaning as the phrase "in custody" in the predecessor statute. That conclusion is consistent with Congress's use of the term "custody" in the title of Section 3585(b), and with the sparse legislative history of that Section. The Senate Report that accompanied the Comprehensive Crime Control Act described Section 3585(b) as "provid[ing] that the defendant will receive credit towards the sentence of imprisonment for any time he has spent in official custody prior to the date the sentence was imposed." S. Rep. No. 225, 98th Cong., 1st Sess. 129 (1983).

U.S. 83, 91-92 (1990). Because the Bureau's interpretation of Section 3585(b) is reasonable, the court of appeals was required to defer to it, even if the language of that statute would bear a broader reading. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-844 (1984).

1. Under *Chevron*, the first inquiry is whether the statute reveals an "unambiguously expressed intent of Congress" on "the precise question" addressed by the agency's interpretation. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 843. If it does, that ends the inquiry. *Id.* at 842-843; *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, No. 93-1612 (Jan. 18, 1995), slip op. 5. If, however, "the agency interpretation is not in conflict with the plain language of the statute, deference is due." *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992); see also *United States* v. *City of Fulton*, 475 U.S. 657, 666 (1986) ("We must uphold [the agency's] interpretation if the statute yields up no definitive contrary legislative command and if [its] approach is a reasonable one"). Deference is especially appropriate when "a full understanding of the force of the statutory policy in the given situation * * * depend[s] upon more than ordinary knowledge respecting the matters subjected to agency regulations." *United States* v. *Shimer*, 367 U.S. 374, 382 (1961).

The court of appeals did not dispute that BOP is the agency charged with the administration of Section 3585(b). See *United States* v. *Wilson*, *supra* (BOP, as designee of the Attorney General, computes credit after defendant begins his sentence). And that court did not find that Congress focused on "the precise question" at issue here and "clearly and un-

ambiguously" intended that credit be awarded to defendants who have been ordered to comply with restrictive conditions of release. The court concluded, however, that deference is not due to the Bureau's interpretation of Section 3585(b) for two reasons. First, the court believed that the Bureau's interpretation of Section 3585(b) is inconsistent with its interpretation of the phrase "in custody" in former Section 3568. Pet. App. 9a-10a. Second, the court noted that the Bureau's interpretation of the new credit provision was not formally embodied in a regulation "subject to the rigors of the Administrative Procedure[] Act, including public notice and comment." *Id.* at 9a. Neither objection has merit.

2. The court of appeals erred in stating (Pet. App. 9a-10a) that the Bureau has taken inconsistent positions in administering the credit statutes, because the Bureau has now abandoned a "functional approach" to the custody issue that it purportedly used under the predecessor statute. The Bureau never applied the sort of unguided "functional approach" that the court believed was the hallmark of the agency's interpretation of the predecessor statute. The court's contrary conclusion was based on a misreading of a rarely used exception to the Bureau's policy under the old statute.

In Program Statements issued under the predecessor statute, the Bureau consistently denied credit to federal prisoners for time spent at a halfway house or other similar institutions as a condition of pretrial release. For example, in Program Statement No. 5880.24 (Sept. 5, 1979), which interpreted former Section 3568, the Bureau provided that "[j]ail time credit will be given for time spent in the custody of the Attorney General," that "[t]ime spent in resi-

dence in a residential community center * * * as a condition of bail or bond * * * is not creditable as jail time," and that "a 'highly restrictive' condition of bail or bond * * * is not considered as time in custody." Pet. App. 36a, 37a-38a (emphasis omitted). Those views were a consistent feature of the Bureau's administration of Section 3568.

The general rule applied by the Bureau under the predecessor statute was subject to a narrow exception. That exception permitted credit for "time spent in a jail-type facility * * * as a condition of bail or bond * * * because of the greater degree of restraint." Pet. App. 38a (emphasis omitted). The Bureau first adopted that exception in 1975, in response to *Waldorf* v. *United States*, No. C-74-339 (W.D. Tenn. Jan. 10, 1975) (unpublished), where the court ordered that credit be given to a prisoner who had been ordered to spend weekends and nights in jail as a condition of "bail." See Program Statement No. 7600.59, § 4b(5) and attachment 1, at page 3 (May 27, 1975); compare Program Statement No. 7600.51, § 4a (Oct. 30, 1969). The exception was applied in the rare cases in which a defendant was required to spend some time in the custody of correctional authorities as a condition of bail.

The Bureau understood the decision in *Waldorf* to require a limited functional inquiry in a small class of cases (*i.e.*, those in which the defendant was in the custody of correctional authorities for part of the time when he was formally on "bail"), but its accommodation of that narrow decision was not an adoption of a general functional approach to the credit issue.[10] The focus of the exception was on the type

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[10] As we noted at the petition stage (Reply Br. 3), the Bureau occasionally incorporates adverse judicial rulings into

of *facility* involved (*i.e.*, whether it was under the control of correctional authorities), rather than (as the court of appeals apparently believed) on the restrictiveness *vel non* of the defendant's bail conditions. Indeed, except when required by court order (see, *e.g.*, *Brown* v. *Rison*, *supra*), the Bureau did not apply that statement to give credit to a defendant who was released to a private community treatment facility. That point is illustrated by the numerous reported cases decided under the predecessor statute, which were litigated precisely because the Bureau granted no credit to the inmates involved.

In any event, even if the Bureau's acquiescence in the result in *Waldorf* were viewed as an expression of the *Bureau's* view of the law, the current Program Statement applicable to Section 3585(b) contains no functional exception. The Bureau was not precluded from reverting to the rule it followed before *Waldorf*, especially in light of the intervening passage of the Comprehensive Crime Control Act of 1984, which underscored that Congress did not believe that restrictive conditions of bail qualify as "imprisonment." An agency "is not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation." *Thomas Jefferson University* v. *Shalala*, 114 S. Ct. 2381, 2389 (1994) (quoting *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993)). And, as this Court recently emphasized, "any change in the [agency's] position might reduce, but would not eliminate the deference we owe

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its policy statements, especially when it is not feasible to obtain further review of those rulings in a prompt fashion. That does not indicate agreement with the merits of the rulings.

[its] reasoned determinations." *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, *supra*, slip op. 12.

3. The court of appeals was also wrong to deprecate the agency's interpretation of Section 3585(b) on the ground that it was not the subject of notice-and-comment rulemaking. An agency's informal interpretations of a statute it administers are "not entitled to the same deference as norms that derive from the exercise of * * * delegated lawmaking powers," but those informal interpretations are "still entitled to some weight on judicial review." *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991). Here, BOP has embodied its view in a Program Statement that governs the day-to-day decisions of prison administrators nationwide. Pet. App. 45a-50a; see also *id.* at 33a-44a; Federal Bureau of Prisons, *Sentence Computation Manual CCCA* (1992 & Supp. 1994).[11] Those guidelines provide uniform national rules for a range of issues that BOP has confronted repeatedly in the course of its nearly 30-year experience administering the custody credit provisions, such as whether credit should be granted for time spent in community confinement, on a writ of habeas corpus from non-federal custody, or in detention pending federal prosecution while simultaneously serving another sentence. The Bureau's judgment reflects the type of expertise in explicating ambiguous statutory lan-

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[11] We have lodged with the Clerk of the Court three copies of the Bureau's *Sentence Computation Manual*, the Program Statements cited in this brief (that are not printed in the appendix to the petition), and the unpublished decision in *Waldorf*. We have also provided counsel for respondent with copies of those materials.

guage that warrants judicial deference. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696-697 (1991).

Moreover, even if the Bureau were required to administer the credit statute based on a functional concept of "official detention," the Bureau's reliance on the categories prescribed by the Bail Reform Act of 1984 would be permissible. The court did not dispute the reasonableness of BOP's view that "conditions at community treatment centers *generally* are neither penal in nature nor nearly as restrictive as those in a full custodial environment." Pet. App. 19a (emphasis in original). The court believed, however, that the Bureau was required to focus on the specific restrictions imposed on *respondent* at the Volunteers of America facility. *Id.* at 19a-20a. That reasoning misconceives the nature of administrative decision-making. So long as its "approach is a reasonable one," *United States* v. *City of Fulton*, 475 U.S. at 666, the Bureau is entitled to adopt a general rule to cover credit for community confinement on the basis of empirical assumptions that are *generally* true, even if those assumptions do not hold true in *every* case. See *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612, 619 (1991). It is sufficient that the legitimate concerns that the rule seeks to promote are generally implicated by cases falling within the class covered by the Bureau's rule. Indeed, one reason often advanced for formulating a general rule is to avoid the need to establish a special justification for a particular action in every case. See, *e.g.*, *Arizona* v. *Roberson*, 486 U.S. 675, 681-682 (1988); *Arizona* v. *Maricopa County Medical Soc'y*, 457 U.S. 332, 351 (1982); *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975).

The court of appeals' analysis also ignores the fact that any imprecision in the Bureau's general rule is significantly outweighed by the ease and certainty of its operation, which promotes the even-handed application of the credit provision. Under its interpretation of Section 3585(b), the Bureau can make credit determinations on the basis of the documentary evidence that ordinarily accompanies the inmate after he is sentenced—the inmate's judgment of conviction and bail form. Those documents will ordinarily disclose whether the defendant was released on bail during the pendency of the proceedings, and on what conditions. Typically, however, those documents will not contain any description of precisely how "jail-like" those conditions were. Unlike the rule adopted by the court of appeals, which requires time-consuming litigation on the basis of an amorphous standard (see pp. 15-17, *supra*), the rule adopted by the Bureau permits the Bureau to make credit determinations quickly and efficiently on the basis of information obtainable from reliable law enforcement sources. That approach to the administration of the credit statute is a reasonable one, and the court of appeals erred in rejecting it.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In The

# Supreme Court of the United States

October Term, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

*Petitioners,*

v.

ZIYA K. KORAY,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

## BRIEF FOR THE RESPONDENT ZIYA K. KORAY

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## QUESTION PRESENTED

Section 3585(b) of 18 U.S.C., entitled *"Credit for Prior Custody"* states that a "defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." The question presented is whether "official detention" includes time spent held under any court ordered conditions restricting liberty which constitute total "jail-type confinement," or is limited solely to time spent held in the custody of the Attorney General under a "detention order" issued under 18 U.S.C. § 3142(e).

## PARTIES TO THE PROCEEDINGS

The statement in the Brief for the United States is adopted.

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No. 94-790

In The

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## BRIEF FOR THE RESPONDENT ZIYA K. KORAY

## OPINION BELOW

The statement in the Brief for the United States is adopted.

## JURISDICTION

The statement in the Brief for the United States is adopted.

## STATUTORY PROVISION INVOLVED

Section 3585 of Title 18 provides:

**Calculation of a term of imprisonment**

(a) **Commencement of sentence.** A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.

(b) **Credit for prior custody.** A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences –

> (1) as a result of the offense for which the sentence was imposed; or
>
> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed;

that has not been credited against another sentence.

## STATEMENT

1. On April 23, 1991, Mr. Ziya Koray was arrested for laundering monetary instruments in violation of 18 U.S.C. §1956(a)(1). After his arrest, Mr. Koray was detained under an 18 U.S.C. §3142 "detention order" which requires commitment to "the custody of the attorney general for confinement." 18 U.S.C. §3142(i)(2). Koray

was confined at a county jail in Rockville, Maryland. On June 18, 1991, Mr. Koray entered a plea of guilty to the charged offense in the United States District Court for the District of Maryland. On June 25, 1991, after his guilty plea was entered, but prior to sentence, a magistrate judge entered an order pursuant to 18 U.S.C. 3142(c) "Release on conditions." This court order placed Mr. Koray in the custody of the federal Pre-trial Services Agency and stated that he was to be "confined to premises of VOA [The Volunteers of America] and shall not be authorized to leave for any reason unless accompanied by Special Agent Dennis Bass." The premises of the VOA specified in the order was a "halfway house type facility" located in Baltimore, Maryland. On October 21, 1991, almost four months after his guilty plea, the district court sentenced Mr. Koray to 41 months of imprisonment. He remained at the VOA halfway house until November 25, 1991, when he began serving his sentence at Allenwood Federal Prison Compound in Pennsylvania. By then, he had spent 150 days totally confined to and subject to the rules and restrictions of the halfway house. Pet. App. 2a, Joint App. 10, 12, 25, 32.

Koray received credit for the 64 days spent detained in the custody of the Attorney General in the county jail up to June 25, 1991, pursuant to 18 U.S.C. §3585. He sought but was denied credit by the Bureau of Prisons (BOP) for the 150 days he was confined to the halfway house under the "Release on conditions" order between June 25, 1991 and November 25, 1991. Upon exhausting his administrative remedies, Mr. Koray filed a petition for habeas corpus in the United States District Court for the Middle District of Pennsylvania seeking such credit. The

district court denied the petition, finding that a "Release on conditions," no matter how restrictive the conditions, can never amount to "official detention" under 18 U.S.C. §3585(b), Pet. App. 2a, 25a-28a.

2. The court of appeals reversed. Pet. App. 1a-24a. The court held that the presentence time a defendant is confined in a halfway house pursuant to a court order may be "official detention" if the restrictions on the defendant's liberty were equivalent to "jail-type confinement." Because the district court made no factual findings regarding the circumstances of Koray's confinement at the halfway house, the court of appeals necessarily accepted *arguendo* Koray's factual allegations in the district court, which the BOP did not challenge. Koray alleged that he was permitted to leave the halfway house only once in 150 days (for a medical exam), that he had to account for his presence five times a day, that he was subject to random breath and urine tests, that his access to visitors was limited in both time and manner and that there was a paucity of vocational, educational and recreational services compared to a federal prison facility. The court of appeals held that the combination of court ordered total 24 hour a day confinement and these uncontested allegations, and "because there had been no finding that Koray was in fact held" in a drug treatment facility or a halfway house which he left part of the day on work release, were sufficient to require that the case be remanded to the district court "for the necessary fact finding." Pet. App. 19a, 20a, 24a.

The court decided not to defer to the BOP's current view that "official detention" under §3585(b) is limited to

defendants confined to the custody of the Attorney General pursuant to a "detention order." Under this view, no matter how restrictive the conditions of a "Release on conditions" order, such an order could never result in "official detention". The appellate court found there was no indication that Congress had intended the statute to be read so narrowly.

3. Although it acknowledged that most courts of appeals, with the exception of the Ninth Circuit, had deferred to the BOP's current view, the court analyzed the plain meaning of the words "official detention" and found no support for that view. It pointed out that nothing in the statute requires or suggests that "detention" means only detention in the custody of the Attorney General pursuant to a "detention order." Additionally, the court noted that the BOP itself does not always limit "official detention" to time served under the custody of the Attorney General. The BOP has characterized other custody as "constructive federal custody" and has given presentenced defendants credit for certain times spent in state facilities, even though the defendant was not in the Attorney General's custody. Pet. App. 14a-17a. The Court concluded that Koray's detention was "official" because a court may detain a person as officially as the Attorney General and because it was a court order which placed Koray in the custody of the Pretrial Services Agency and confined him to the premises of the halfway house. Pet. App. 13a, 14a. The court of appeals stated that in construing the statutory language of §3585, it could not ignore the obvious and ordinary meaning of the statutory language. To most people, being forced by court order to live in a halfway house is to be held in custody. Pet. App. 18a.

The court of appeals declined to give the BOP's current interpretation of 18U.S.C. §3585(b) deference because the "Program Statements" in which it appears are merely internal agency guidelines which the BOP may alter at will, as opposed to published regulations subject to the rigors of the Administrative Procedure Act, such as public notice and comment. Pet. App. 9a. Even according the BOP's interpretation "some level of deference," the court concluded that the BOP had not engaged in the necessary "reasoned analysis" of the issue. The court of appeals reviewed the legislative history of 18 U.S.C. §3585. The predecessor statute, 18 U.S.C. §3568 used the words "in custody" rather than "official detention". The court of appeals concluded, as had all the circuits which considered the question, that this change was not intended to alter the meaning of the statute, and that the history of the statute revealed a progressive enlargement of the defendants eligible to receive sentence credit. Pet. App. 4a, 5a, 13a. It noted that the BOP had considered the degree of restraint under the predecessor statute in determining sentence credit, but had changed to its current view based on the change in language from "in custody" to "official detention", despite the unanimity of judicial opinion that no change in meaning was intended by this change in language. Pet. App. 10a-12a. The court therefore determined that the BOP's current interpretation required only "minimal deference" because it was unreasonable and contrary to the fairness Congress must have intended. Pet. App. 18a.

Koray has been released pending further proceedings. *Id.* at 51a.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Section 3585(b) of Title 18, entitled "Credit for prior custody", grants defendants sentence credit for time spent in "official detention" before the sentence began to be served. It is the current opinion of the Bureau of Prisons (BOP), the agency which calculates sentence credit initially, subject to judicial review, see *United States v. Wilson*, 112 S.Ct. 1351 (1992), that "official detention" is limited to defendants detained under a "detention order" (18 U.S.C. 3142), in the custody of the Attorney General in a penal or correctional facility.

In this case the court of appeals has narrowly extended the BOP's interpretation by defining "official detention" as including court ordered confinement to a halfway house which is equivalent to "jail-type confinement." The court's precise holding is limited to those cases in which a court order imposes total 24 hour confinement at facilities which have rules similar to prison rules. In fact, this holding, which allows the "degree of restraint" imposed upon the defendant to be considered, was once the position of the BOP.

The Third Circuit's ruling is supported by the plain meaning of the statute, the language in related statutes, the legislative history of Section 3585(b), Congress' intent with respect to sentencing, the rule of lenity and fundamental fairness. The BOP's current opinion, urged by the Solicitor General, is not entitled to deference because it is unreasonable and is based on an incorrect interpretation of a change in the language of §3585(b) from the predecessor statute, an interpretation directly contrary to the

unanimous opinion of every court of appeals to consider the meaning of this change in language.

Additionally, the BOP's current view is not entitled to deference because it appears in a "Program Statement", which merely reflects the opinion of the agency and may be changed at will, as opposed to a published regulation promulgated under the Administrative Procedure Act, subject to public notice and comment. As this court has recognized, Congress intended the courts to play a significant role in determining sentence credit by having the power to review BOP sentence credit decisions. *Wilson, supra* at 1355. To completely defer to the BOP's current view, no matter how unreasonable, and in an area of judicial expertise (non-technical statutory construction) would make judicial review of important sentence credit determinations meaningless.

The court of appeals decision is in accord with Congress' approval of the use of halfway houses as detention facilities because it will permit federal judges the discretion necessary to use halfway house confinement before sentence as a means of dealing with the mounting problems of prison overcrowding and cost, and also allow greater flexibility in providing for the safety of cooperating defendants, without prejudicing defendants by increasing their total confinement.

Petitioner mischaracterizes this narrow and precise decision as elusive and amorphous, raising the specter of the BOP and the courts being deluged with petitions for sentence credit from prisoners claiming that they were under jail-type restraint. Unlike the line of cases from the Ninth Circuit, which allow sentence credit for less than

complete confinement to a halfway house, if the conditions of release are so restrictive they "approach . . . incarceration." *Mills v. Taylor*, 967 F.2d 1397, 1400 (9th Cir. 1992), the court of appeals expressly excluded from its holding even those confined in a drug treatment facility, or in a halfway house with work release privileges, and pointed out that other release conditions such as home confinement, residing with a relative or confinement for medical treatment which met the Ninth Circuit standard would not meet its definition of jail-type confinement.

The court of appeals decision will not be administratively difficult to implement nor will it result in disparate interpretations of sentence credit claims resulting in a lack of a uniform national policy. It will apply to only a limited number of cases. It does not apply to *any* court ordered residence in a halfway house. Halfway house residence by defendants prior to sentence is limited to a small percentage of defendants. Only those defendants whom the court's order totally confines to the premises of the halfway house, and who are unable to leave even for reasons such as work release or schooling, will meet the initial test of jail-type confinement. All the BOP need do in these cases to determine whether the conditions of release require such total confinement is to read the "Release on conditions" order which sets out those conditions, and which is normally part of the defendant's prison file. The determination of this straightforward question – does the court order impose total confinement? – does not require interpretation of a standard so amorphous or elusive it is likely to produce disparate results in the BOP's awarding of sentence credit nationwide. Only if such total confinement at the halfway house

is specified in the order will the BOP have to go on to determine whether the operational rules at the particular halfway house were sufficiently stringent so that the combination of total confinement to premises and such rules constituted "jail-type confinement." Given the less than infinite variety of operational rules that could prevail at halfway houses, and the BOP's frequent dealings with these facilities, the Third Circuit's ruling will not render more difficult the BOP's performance of its duties, and will increase the fairness with which sentence credit is awarded.

## ARGUMENT

**THE TIME SPENT BY A DEFENDANT HELD PRIOR TO HIS SENTENCE UNDER COURT ORDERED RESTRICTIONS ON HIS LIBERTY WHICH CONSTITUTE TOTAL "JAIL-TYPE CONFINEMENT" SHOULD BE CONSIDERED TIME SPENT IN "OFFICIAL DETENTION" UNDER 18 U.S.C. §3585(b) AND THEREFORE CREDITED TOWARD HIS SENTENCE.**

### A. Neither The Text Of The Statute, The Text Of Related Sentencing Statutes, The Program Statements Of The Bureau Of Prisons Interpreting The Statute, Or The Statute's Legislative History Provide A Sufficient Basis For Concluding That The Meaning Of "Official Detention" Should Be Limited To Time Spent Held Under An 18 U.S.C. §3142 Detention Order In The Custody Of The Attorney General

Section 3585(b), *"Credit for Prior Custody"*, provides that a defendant "shall be given credit toward the service of a term of imprisonment for any time spent in official

detention" before he begins serving his sentence. The phrase "official detention" is not defined in the statute, but what the phrase dues *not* mean is clear; it does not mean only time spent confined under a detention order in the custody of the Attorney General. As the court of appeals pointed out, there is no language in the statute which requires or even suggests such a limited reading of "official detention." Pet. App. 13a, 14a.

The only way a defendant being held to answer a federal charge may, prior to sentence, "be committed to the custody of the Attorney General for confinement in a corrections facility" is if he is the subject of a "detention order" issued pursuant to the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* It is the current opinion of the BOP that "official detention" means only time confined under such a *"federal detention order"*, and that any time spent confined under a court ordered "Release on conditions" under §3142(c), no matter how restrictive such conditions, "is not considered as time spent in official detention." BOP Sentence Computation Manual CCCA Program Statement 5880.28 (February 21, 1992 & Supp. 1994) (emphasis supplied). However, as the Third Circuit concluded, the absence of language which could easily have been used if Congress intended such a limited and technical meaning strongly suggests a broader interpretation is appropriate.

Congress enacted both the Bail Reform Act and §3585(b) as part of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. The same Congress that in 1984 created a "detention order" in the Bail Reform Act changed the language of the sentence credit provision from the words "in custody", used in 18

U.S.C. §3568, the predecessor sentence credit statute, to "official detention" in 18 U.S.C. §3585(b). If that same Congress had intended to limit "official detention" to only time confined in the custody of the Attorney General pursuant to a detention order, it could easily have said so. Congress could have said "official detention" is only detention under a Bail Reform Act "detention order," or is only detention under the custody of the Attorney General, or both. Additionally, Congress could have said sentence credit should be given for "any time spent under an order of detention," without using the phrase "official detention" at all. Congress could also have entitled §3585(b) "Credit for time served under a detention order," or "Credit for time served in the custody of the Attorney General," rather than entitling the section "Credit for Prior Custody." Congress chose to say none of these things.

What Congress did choose to say in related sentencing provisions of the Comprehensive Crime Control Act in which it used the phrase "official detention," and the BOP's own interpretation of those provisions, demonstrate that "official detention" is not limited to time confined under a "federal detention order" and does include halfway house confinement.

Section 18 U.S.C. §3622, entitled "Temporary release of a prisoner," permits the BOP to release a sentenced prisoner to "participate in a training or educational program in the community while continuing in official detention at the prison facility" (18 U.S.C. 3622(b)), or to "work at paid employment in the Community while continuing in official detention at the penal or correctional facility" 18 U.S.C. §3622(c). By stating that a prisoner

could be on work release while being in "official detention" and differentiating between a "prison facility" and a "penal or correctional facility", Congress demonstrated that it was not limiting "official detention" to total confinement in a traditional prison. Since work release is one of the features associated with halfway houses, this language shows that Congress intended that a prisoner could be in "official detention" while residing in a halfway house. Thus, in a related provision, §3622(c), Congress "used official detention according to its ordinary meaning, and there is no reason to think that Congress used the same phrase in any more technical or restrictive fashion in §3585(b)." *United States v. Davis*, 763 F.Supp. 638, 641 (D.D.C. 1991).

The Solicitor General states that "basic canons of construction suggest"[1] that "official detention" should have the same meaning in §3585(b) as it does in these related statutes. These statutes use "official detention" to describe the status a *sentenced* prisoner must remain in while participating in a training program in the community (§3622(b)), or while being permitted to be on work release (§3622(c)). Section 3622(c) requires that the "official detention" be in a "penal or correctional facility." Because the Solicitor General assumes that a halfway house is neither a "penal or correctional facility," he concludes that residence in a halfway house cannot be "official detention" within the meaning of either §3622(b) or (c) because these "related statutes make clear that a

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[1] Brief for the United States at p. 13.

sentence of imprisonment may be served only in a penal or correctional facility under federal or state control."[2]

However, the fact is that the BOP does consider a halfway house to be a "penal or correctional facility" within the meaning of §3622(c), and therefore considers sentenced prisoners on work release at halfway houses to be in "official detention" within the meaning of the section. If the BOP did not take this position it would be violating the clear mandate of §3622(c), that sentenced prisoners continue in "official detention" while on work release, the thousands of times each year it transfers sentenced prisoners to halfway houses where they go on work release.

In a recent Program Statement dealing with its authority to place sentenced prisoners in Community Corrections Centers (CCCs), the BOP interpreted 18 U.S.C. §3624(c) which encourages non-prison confinement, including home confinement, at the end of a sentence,[3] and 18 U.S.C. §3621(b), which gives the BOP

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[2] Brief for the United States at pp. 12, 13.

[3] 18 U.S.C. §3624(c) provides as follows:

**Pre-release custody.** – The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his reentry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

authority to designate any "penal or correctional facility" as the place of imprisonment, as not restricting the BOP from placing sentenced inmates in CCCs. The BOP uses the phrase "CCCs" interchangeably with halfway houses in this Program Statement, in which it refers to "CCCs, commonly referred to as halfway houses."[4] In this same Program Statement the BOP unequivocally states *"[a] CCC meets the definition of a penal or correctional facility"* as those terms are used in 18 U.S.C. §3621(b) (emphasis supplied).[5]

Basic canons of construction suggest that if a halfway house is a "penal or correctional facility" within the meaning of 18 U.S.C. §3621(b), it is a "penal or correctional facility" within the meaning of a related statute, 18 U.S.C. 3622(c). Therefore, the meaning of "official detention" in §3622(c) includes confinement in a halfway house, because a halfway house is a "penal or correctional facility." Finally, since the meaning of "official detention" in §3622(c) includes confinement in a halfway house, the meaning of "official detention" in a related statute, §3585(b), the statute at issue in this case, must

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[4] BOP Program Statement 7310.02(5a) (1993). The BOP considers the halfway house in which Koray was confined to be a "Community Corrections Center or CCC" because it so described it in three of its four responses to his sentence credit request. Joint App. 26, 30, 32.

[5] BOP Program Statement 7310.02(4) (1993). BOP Program Statement 7310.02 (1993) reproduced in Respondent's Appendix at App. 1-7.

have the same meaning, and must include confinement in a halfway house.

Petitioner's assertion that the penal or correctional facility to which the BOP may assign a sentenced prisoner under 18 U.S.C. §3621(b) must be under federal or state control is not found within any statute. All that §3621(b) provides is that the facility "meets minimum standards of health and habitability established by the Bureau, *"whether maintained by the federal government or otherwise."* 18 U.S.C. §3621(b) (emphasis supplied).

There are words used in other parts of §3585 which also demonstrate that "official detention" cannot be limited to time spent under a "federal detention order." Section 3585(b)(2) provides that a defendant is to receive sentence credit for time spent in "official detention"

> (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed.

Time spent under *State* court orders of commitment within the chronology set forth in 3585(b)(2) is clearly "official detention" for credit against the federal sentence. The BOP itself has acknowledged this. As the court of appeals said:

> We note that the Bureau has characterized other custody as 'constructive federal custody' and has been willing to give presentence defendants credit under §3585 and its predecessor §3568 for certain time spent in state facilities, even though

> the defendant was not in the Attorney General's custody. Pet. App. 15a.[6]

There is no reason why custody imposed by an official order of a federal court should not be treated similarly.

The legislative history of §3585(b) also demonstrates that the BOP's current limited interpretation of "official detention" is wrong. Whether confined under a "federal detention order" or a very restrictive "Release on conditions" order, a defendant is in custody. Section 3585(b) is entitled "Credit for prior custody." The predecessor statute, §3568 used the phrase "credit for time in custody" in its title and provided sentence credit for time spent "in custody." 18 U.S.C. §3568 (1982) (repealed). As Petitioner states:

> every court of appeals to consider the question has held that the phrase "official detention" in Section 2585(b) has the same meaning as the phrase "in custody" in the predecessor statute. (Brief for the United States at p. 11, n.9).

A Senate Report has described present §3585(b) as providing sentence credit for time spent "in official custody" S. Rep. No. 225, 98th Cong. 1st. Sess. 129 (1983). The fact that it is undisputed that Congress used "custody" and "official detention" interchangeably is significant in analyzing the relationship between the Bail Reform Act and §3585(b).

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[6] The Solicitor General acknowledges that the BOP "grants credit for time spent in state custody." (Brief for the United States at p. 11).

Since "custody" is synonymous with "official detention", as used in §3585(b), then at least some forms of custody constitute "official detention." In the Bail Reform Act Congress used the word "custody" repeatedly. One of the conditions of release a court may impose is a condition that the person "*return to custody* for specified hours following release for employment, schooling or other limited purposes." 18 U.S.C. §3142(c)(B)(xiii) (emphasis supplied). This language suggests that Congress envisioned that a "Release on conditions" order could include "custody" of varying degrees of restrictiveness, from custody with specified reasons for release, up to total confinement and that "custody" was not limited to custody under a "detention order." Since "custody" and "official detention" have the same meaning under §3585(b), at least highly restrictive "custody" such as Koray endured constitutes "official detention" under §3585(b). This language also shows that congress contemplated that court-ordered confinement to a halfway house could be a form of "custody," and therefore "official detention", because special conditions such as work release are available at halfway houses.

The Solicitor General argues that since the legislative history shows that §3585(b) was not intended to change the rules for sentence credit embodied in the 1966 predecessor statute, and because courts interpreting the predecessor statute prior to §3585(b)'s enactment in 1984 held it to limit sentence credit to those detained in a place of confinement, and since Congress must have been aware of these judicial interpretations, Congress did not intend sentence credit for defendants not actually incarcerated. (Brief for the United States at pp.17-21).

However, the cases decided under the predecessor statute did not deal with defendants in halfway house confinement. These cases dealt with defendants who were allowed to be at large before sentence, but were subjected to rules and conditions limiting their movement or travel such as requiring periodic reporting to a probation officer, turning in passports, and avoiding contact with certain persons. These decisions simply held that "in custody" as used in predecessor statute §3568 did not apply to defendants released at large on bail no matter what restrictions they had been placed under. See *Cerrella v. Hanberry*, 650 F.2d 606, 607 (5th Cir.), *cert. denied*, 454 U.S. 1034, 102 S.Ct. 573, 70 L.Ed.2d 478 (1981); *United States v. Robles*, 563 F.2d 1308 (9th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 925, 98 S.Ct. 1491, 55 L.Ed.2d 519 (1978); *Polakoff v. United States*, 489 F.2d 727, 730 (5th Cir. 1974); *Ortega v. United States*, 510 F.2d 412 (10th Cir. 1975) (per curiam). As one court stated in a case quoted by the Solicitor General,[7] "in custody" does not "refer to the stipulations imposed when a defendant is *at large* on conditional release." *United States v. Peterson*, 507 F.2d 1191, 1192 (D.C. Cir. 1974) (per curiam) (emphasis supplied). Therefore, those decisions, and presumed congressional awareness of them, provide no evidence that Congress intended to limit sentence credit to exclude confinement at a halfway house.

The Solicitor General argues that the Court of Appeals was required to defer to the BOP's current view of the meaning of "official detention", not because it is necessarily correct, but because it is "reasonable", relying

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[7] See Brief for the United States at p.20.

primarily on *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (Brief for the United States at p.22).

Under *Chevron*, the first question is "whether Congress has spoken to the precise question at issue. If the intent of Congress is clear", which is Respondent's position as set forth in Point B, *infra*, that intent controls. Only "[i]f the statute is silent or ambiguous with respect to the specific issue," does the question become whether the agency's interpretation "is based on a permissible construction of the statute". *Chevron*, supra, at 842-43.

However, "[t]o read *Chevron* as laying down a blanket rule, applicable to all agency interpretations of law, such as 'always defer to the agency when the statute is silent,' would be seriously overbroad, counterproductive and sometimes senseless." Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 373 (1986).

The unreasonableness of the BOP's current view is demonstrated by the fact that the BOP has erroneously revised its previous program statement on the subject of sentence credit. This BOP change of position completely disregards the unanimous judicial interpretation of §3585(b)'s legislative history, and therefore, its current view is entitled to no deference. The previous BOP Program Statement dealing with sentence credit immediately prior to the current (1992) Program Statement was issued in 1979, when predecessor statute 18 U.S.C. §3568 was in effect. In that previous Program Statement the BOP, in defining the meaning of "in custody", distinguished

between "[t]ime spent in residence in a residential community center" where "the degree of restraint . . . is not sufficient restraint to constitute custody," as opposed to "[t]ime spent in jail-type facility . . . as a condition of bail or bond," which the BOP *then* viewed as "creditable as jail time because of the greater degree of restraint." Bureau of Prisons, Program Statement No. 5880.24(5)(b)(5) (Sept. 5, 1979). This analysis based on the degree of restraint was changed in 1992 in the current BOP Program Statement interpreting §3585(b). In 1989, after §3585 went into effect, a BOP Operations Memorandum written by its General Counsel stated simply that under new §3585(b) sentence credit would be given for time spent "in pre-sentence custody."[8] The current BOP position looks only to whether the defendant was held under a federal detention order and completely disregards the degree of restraint. Despite this unanimity of judicial opinion that the change in phrases from "in custody" to "official detention" was not intended to change the meaning of the statute, the BOP has changed its interpretation of the sentence credit statute based solely on this change in phrases. This is shown by the fact that the BOP retains the degree of restraint analysis for defendants still governed by §3568. Bureau of Prisons, Program Statement 5880.30(7)(b)(5) (July 16, 1993). The BOP's change of position is thus clearly based on an incorrect interpretation of this change in language.[9]

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[8] BOP Operations Memorandum "Credit for Time in Custody Under 18 USC 3585(B)" (October 23, 1989) is reproduced in Respondent's Appendix at App. 8-11. The language quoted above is at App. 9.

[9] In its brief at pp.23-26 the Solicitor General, recognizing the damage done to his deference argument by the BOP's

The BOP's current view should also not be deferred to because, as the court of appeals noted, Program Statements are merely internal agency guidelines subject to being changed at will, rather than published regulations subject to the rigors of the Administrative Procedure Act, including public notice and comment. Pet. App. 9a.

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mistaken change of position, strains to argue that the BOP did not really change its position. Since he cannot deny the BOP's use of the "degree of restraint" language in the earlier Program Statement interpreting §3568, the Solicitor General in effect argues that, as to the use of this language, the BOP said it but didn't mean it; and anyway it never applied it; it was a "narrow exception" that was applied in rare cases, and "was not an adoption of a general functional approach to the credit issue,"; it was merely BOP's recognition that an unpublished court decision "required a limited functional inquiry in a small class of cases." This argument only adds to the reasons for not giving deference to the current BOP Program Statement. Not only can the BOP change its opinion at will, it can change it by simply not applying its own language, without being required to inform anyone that it has done so.

It is also interesting to note that the current BOP view was first set forth in a Program Statement issued *after* Koray had requested sentence credit from the BOP. Koray first sought sentence credit from the BOP in December 1991. Joint App. 22, 25. The initial BOP denials of his request were based on the 1979 Program Statement interpreting predecessor statute §3568. Joint App. 28, 30. Despite the fact that §3585(b) was enacted in 1984 and became effective in 1987, the BOP waited until February 21, 1992 to come up with its current view as to sentence credit. The later BOP denials of Koray's request were based on this current BOP view (Joint App. 34, 35). Perhaps what caused the BOP change in Program Statements was that the facts of Koray's case might have fit under the old "degree of restraint" language, as the court of appeals pointed out, Pet. App. 11a, and the BOP would have been required to apply the words it wrote but didn't really mean.

Unlike the EPA's interpretation in *Chevron*, the BOP's current view is not "supported by the public record developed in the rule making process", *Chevron, supra*, at 863.

An additional argument against judicial deference to the BOP's interpretation of 18 U.S.C. §3585(b) is the lack, in this case the demonstrated lack, of BOP expertise in construing the meaning of non-technical words in a statute, something which courts have unique expertise and experience in doing. We are not dealing with the scientific and technological expertise required, for instance, when the Environmental Protective Agency is promulgating regulations as part of its administering complicated environmental laws or reconciling conflicting policies. Again, in contrast to *Chevron*, this is not a situation in which "the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies." (*Chevron, supra*, at 865). Nor is it clear that the BOP has been delegated any rule making or policy making powers by Congress on this issue. The BOP, acting for the Attorney General, has merely been given the responsibility for administering the statute. *United States v. Wilson*, 112 S.Ct. 1351, 1355 (1992). We are not dealing with matters of prison security, prison administration or placement of prisoners, which the BOP does have experience and expertise in, and are areas in which courts are and should be reluctant to intrude. Sentence credit, however, is another matter when more than computation of time is required. When the "traditional tools of statutory construction" such as the interpretation of a statute text, an analysis of related statutes and legislative history, and an inquiry into congressional intent on the subject of

which the statute is a part, permit a court to determine Congress' intent on the "precise question at issue," then there need be no judicial deference because, as this Court has stated, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron, supra,* at 843 n.9.

Congress intended the courts to play a significant role in sentence credit determination. Section 3585, "Calculation of a Term of Imprisonment" is part of "Subchapter D – Imprisonment" which is comprised of §§3581-3585. This subchapter deals primarily with the powers of the *court* in connection with imposing sentences. In *United States v. Wilson*, this Court held that the Attorney General, acting through the BOP, should continue to calculate credit at the time of sentencing and that this BOP decision was subject to judicial review. Initial computation by the BOP at sentence, and judicial review after exhaustion of administrative remedies, were both "well established procedures", and therefore it was "not lightly to be assumed that Congress intended to depart from a long established policy.", *United States v. Wilson, supra,* at 1355, citing *Robertson v. Railroad Inter Board,* 268 U.S. 619, 627 (1925). The judicial review recognized in *Wilson, supra,* would be rendered meaningless if courts were required simply to defer to the BOP's interpretation of the key phrase in the sentence credit statute. Judicial review must mean more than checking the arithmetic of a BOP sentence credit computation.

> [I]t is clear that in the event there is a dispute between the parties over the right to credit, the dispute must be resolved by the court. No one

> contends that the Attorney General has unreviewable discretion to determine the appropriate credit in any case. *United States v. Wilson*, 112 S. Ct. at 1356 (Stevens, J., dissenting).

The Solicitor General and the current BOP interpretation of "official detention" contend that a defendant is either detained or released pursuant to the Bail Reform Act, and only a detained defendant should receive sentence credit. Congress could not have intended such a black and white, either-detained-or-released criterion because it provided a continuum of graduated levels of release beginning with release on personal recognizance through detention. In 18 U.S.C. §3142, the Bail Reform Act permits a court to include in a "Release on conditions" order any condition which

> [I]s reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community. (18 U.S.C. §3142(c)(XIV)).

Such court ordered conditions may be so restrictive as to equal the confinement under a detention order. Thus, "release" and "detention," as these terms are used in the Bail Reform Act, may not always be mutually exclusive opposites; they may be mirror images of each other. When that occurs, and the release conditions constitute "jail-type" confinement, as they do in this case, a defendant should not be denied sentence credit when he has been completely deprived of his liberty solely because the court order confining him is called a "Release on conditions" rather than a "detention order."

Sentence credit, which involves liberty, should not depend on tortured arguments about nomenclature; the

title of the order of confinement, the name of the place of confinement, or the identity of the jailor, do not change the nature or degree of the confinement. The kind of restrictions on liberty to which a court ordered Koray to be subjected – total confinement to the premises of the halfway house, living under a stringent institutional regimen – should compel the conclusion that he was in "official detention" for the purpose of sentence credit.

### B. The Plain Meaning Of The Words Of The Statute, Congress' General Intent With Respect To Sentencing, The Rule Of Lenity, And, Fundamental Fairness Require That Respondent Receive Sentence Credit For The 150 Days He Was Completely Deprived Of His Liberty By Court Order.

In attempting to discern what Congress meant by the phrase "official detention" in 18 U.S.C. §3585(b) "the ordinary and obvious meaning of the phrase is not to be lightly disregarded." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987). "Official" has been defined as something "prescribed or recognized as authorized". Webster's Ninth New Collegiate Dictionary at p.820 (1986). The same dictionary defines "detention" as "a period of temporary custody prior to disposition by a court" see *Id.* at 345.

A magistrate judge issued an official order authorized under 18 U.S.C. 3142(c) entitled "Order Specifying Conditions of Release." This order placed Koray "in the custody of the Pretrial Services Agency and made it a condition of his release that he "shall be *confined to the premises of VOA and shall not be authorized to leave for any reason* unless accompanied by Special Agent Dennis

Bass." (Emphasis supplied). Joint App. 8-15. As the court of appeals concluded, "[i]t is therefore difficult to view Koray's detention as other than official . . . " (Pet. App. 14a).

Koray was in "official *detention*" because he was forced by an order of a court to be totally confined to the premises of a halfway house and to be subject to the numerous restrictions and rules that prevail there "as a period of temporary custody prior to disposition by a court." As Koray has alleged, unchallenged by the BOP, he was permitted to leave the halfway house only once in 150 days (for a medical exam), he had to account for his presence five times a day, he was subject to random breath and urine tests, his access to visitors was limited in both time and manner and there was a paucity of vocational, educational and recreational services when compared to a prison facility. (Pet. App. 19a-20a). As the court of appeals noted, the BOP has admitted that the "Volunteers of America maintains a halfway house similar to the manner in which the Bureau of Prisons may also operate such facilities." (Pet. App. 20a).

Such judicially ordered complete confinement under prison type rules is clearly within the "ordinary and obvious" meaning of "official detention."

In addition to giving effect to the plain meaning of Congress' words, granting sentence credit for jail-type confinement in halfway houses would serve the congressional intent to encourage the use of alternative confinement facilities such as halfway houses. See 18 U.S.C. §3624(c).

> A report by the United States General Accounting Office released in late 1991 found that the prison crowding would be reduced and costly prison building could be avoided by increasing the current use of the halfway house system . . . The cost of housing an inmate in a prison far exceeds the cost for the same inmate at a halfway house.

Garry A. Berger, *Pre-Sentence Halfway House Residents: Are they Entitled to Credit Toward Subsequent Prison Sentences*, 27 Colum. J.L. & Soc. Probs. 191, 194 n.11 (1993). Permitting judges the flexibility to use halfway houses for presentence detainees would alleviate these problems, and would also enable judges to use halfway houses to safeguard or facilitate the cooperation of cooperating defendants, without increasing a defendant's sentence time.

If there is to be no sentence credit even for total halfway house confinement, a judge who wants to utilize such complete confinement to relieve overcrowding at the facility housing defendants detained under an 18 U.S.C. §3142 "detention order", or who wants to change the place of confinement of a cooperating defendant at the request of the Government for safety reasons or to facilitate the cooperation, will find his or her discretion severely restricted. If a defendant is now to understand that he will not receive sentence credit for such confinement because he is being "released", he will be unlikely to sign and agree to the "Conditions of Release" order. Without such agreement by the defendant it is not clear that the court could or should compel such release.

Sentence credit should be given to defendants totally confined to halfway houses because such confinement

meets many, if not all, of Congress' major goals in sentencing. Total confinement at a halfway house and being subject to its numerous rules and restrictions is a complete loss of liberty in every sense of the word. It is certainly comparable to confinement at minimum security facilities, which do not place prisoners in prison cells. See American Correctional Association, Standards for Adult Correctional Institutions §§2-4131, 2-4177 (2d Ed. 1981). It provides punishment, incapacitation (removal from society), deterrence, and rehabilitation. See *Berger, supra*, at 219-222 (1993). As the court of appeals noted, granting sentence credit for substantial custodial confinement has been advocated by knowledgeable observers.

> Such an understanding of "custody" has also been articulated by organizations involved in defining the standards in the filed. See 3 American Bar Association, Standards for Criminal Justice 18-319 (2d ed. 1980) (should grant credit for time spent in "custody," including any bail program which "imposes substantial restrictions on the offender's freedom of activity"); National Advisory Commission on Criminal Justice Standards and Goals, Corrections Sec. 5.8 comment. (1973) ("In some cases . . . conditions for pretrial release are substantial and involve serious restrictions on liberty. Where supervision is substantial, courts should be authorized to grant a measure of credit for such time against the sentence imposed."). Pet. App. 18a, 19a.

The Solicitor General argues that allowing the court of appeals decision to stand, and not adopting the BOP's simply "bright-line" rule – released or detained – will

cause an administrative nightmare for the BOP, and present federal courts with endless claims of "jail-type confinement" that will be difficult for judges to resolve.

This argument distorts the narrow holding the court of appeals has carefully crafted and limited. Only a small percentage of defendants are held in halfway houses before sentencing Pet. App. 21a. Only defendants totally confined to the halfway house premises by court order are apparently subject to the ruling. Expressly excluded are even "confinement in drug rehabilitation facilities . . . [or] any halfway house where the defendant leaves to work during part of the day," however restrictive the regimen at such a facility. (Pet. App. 21a-24a). The court of appeals' definition of "official detention" does not include "the vast array of alternative mechanisms" used in federal confinement, and its ruling does not "go as far as does the Ninth Circuit which appears to authorize credit for confinement under somewhat less restrictive conditions" than would meet the criterion of jail-type confinement. Pet. App. 19a, 21a. The court pointed out that many of the cases which granted sentence credit in the Ninth Circuit would not meet its "jail-type confinement" standard, such as living with parents, residing in a halfway house with work release, or daytime release from the facility. It went on to point out that the results in the cases in which credit was denied would not change because "the conditions imposed were not substantial enough to be equivalent to imprisonment," e.g. home confinement, confinement to an uncle's apartment with some release provisions, pre-trial confinement for medical treatment. Pet. App. 20a, 21a. Therefore,

unless the defendant is ordered by the court to be confined to the halfway house 24 hours a day, as was Koray, it will be difficult to argue that he is in "jail-type confinement." Almost all the cases cited by the Solicitor General involve these lesser degrees of confinement.[10]

Petitioner also asserts that the court of appeals decision will lead to the unwarranted sentencing disparities the Sentencing Reform Act sought to reduce because district judges' interpretations of the decision will be far more cumbersome and produce less uniformity than the BOP's current view.[11] However, the more significant, real and reducible sentencing disparity is the one caused by the BOP's current interpretation of §3585(b). The evil of disparity is an unwarranted "variation among sentences imposed upon similarly situated offenders." *Mistretta v. United States*, 488 U.S. 361, 366 (1989). Under the BOP's interpretation, Koray will serve a sentence longer than someone with the same lack of criminal history, sentenced for the same crime, and given the exact same 41 month sentence, solely because his confinement was transferred by one form of court order from the county jail to a halfway house before he began serving his sentence. The other prisoner will be given credit for his entire presentence confinement because he was confined in a facility under a court order called a "detention order", and because he remained confined in a facility not called a halfway house.

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[10] See, e.g., cases cited in the Brief for the United States at p.6, n.1.

[11] See, Brief for United States at pp.15, 16.

The Solicitor General appears to read the court of appeals ruling as relying primarily on the restrictions imposed at the halfway house to which Koray was confined (Brief for the United States at p.27), rather than on the explicit conditions of the "Release on conditions" order stating that Koray "be confined to the premises" of the halfway house and "shall not be permitted to leave for any reason" unless accompanied by a government agent. Perhaps this is because these precise words of the order never appear in the Solicitor General's brief. It is clear that the most important factor in the court of appeals' decision was the precise language of the order, Koray's total confinement to the halfway house. Without such total confinement, no matter how restrictive the rules of the halfway house, the court would not have found "jail-type" confinement. The Solicitor General's reading permits him to argue that it would be very difficult for the BOP to determine what rules prevailed at a given halfway house because it will have to deal with many facilities with varied rules. (Brief for the United States at pp.15-17). This allows him to argue that, by contrast, the BOP "bright-line"rule will produce greater uniformity and can much more easily be implemented because

> "the Bureau can make credit determinations on the basis of the *documentary evidence that ordinarily accompanies the inmate after he is sentenced – the inmates judgment of conviction and bail form.* Those documents will ordinarily disclose whether the defendant was released on bail *. . . and on what conditions."* (Brief for the United States at p.28) (emphasis supplied).

However, the ruling of the court of appeals would certainly permit the BOP to rely on exactly such "documentary evidence" and therefore to "make credit determinations quickly and efficiently on the basis of information obtainable from reliable law enforcement sources," and, therefore, there would be no undue administrative burden. (*Id.* at p.28). Since the conditions imposed by the "Release on conditions" order are the most important thing to be considered in determining whether "jail-type confinement" existed, all the BOP has to do to determine the extent of the defendants' confinement is to look at the "documentary evidence that ordinarily accompanies the inmate," the same "Release on conditions" form which either becomes part of the defendants' prison file, or is readily available in the files of the sentencing court. Only if such total confinement has been ordered does the BOP then have to determine if the rules and restrictions of the particular halfway house were sufficiently "jail-type" to merit sentence credit. The limited inquiry then becomes whether operating rules such as security checks, drug testing and limited visitation are part of the halfway house regimen. The BOP has contracts with many halfway houses, which it uses for sentenced prisoners.[12] There is no evidence that it would be difficult to obtain this information in the limited number of cases in which it will be necessary. There is also no reason to believe that reading court orders to find out what conditions of pre-sentence confinement have been provided requires an interpretation of a standard so "amorphous or

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[12] Two-thirds of defendants in the federal system spend time in a halfway house. *Berger, supra,* 193 n.9.

elusive" that it will result in a lack of national uniformity in sentence crediting. The BOP's performance of its functions will not be rendered more difficult by the Third Circuit's ruling, and its award of sentence credit will be fairer.

It is well settled that any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[13] *United States v. Bass*, 404 U.S. 336, 347 (1971). To the extent ambiguity is present in the statutory reach, the rule of lenity prescribes adoption of the construction most favorable to the prisoner. *See, e.g., McNally v. United States*, 483 U.S. 350, 359-360 (1987). It is respondent's contention that the statute is not ambiguous with respect to whether "official detention" is limited to the custody of the Attorney General pursuant to a "detention order", for the reasons offered, *supra*. Respondent submits it is clearly not so limited. To the extent there is ambiguity in §3585(b) as to which forms of custody are within the meaning of "official detention," this ambiguity should be resolved in the prisoner's favor. However, the BOP, as it has done in dealing with a comparable issue under the same statute,

> has adopted a harsh interpretation in the face of the natural and obvious interpretation of the statutory language [of §3585]. In light of the rule of lenity, that interpretation is unreasonable.

*United States v. Davis, supra*, at 644.

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[13] This case is before this court because there is a split of authority in the Circuits concerning the reach of "official detention." *See, Wilson*, 112 S.Ct. at 1359 n.11 (citing diverse authority and noting Circuit split).

Koray was not, as the Solicitor General repeatedly states, "released on bail." There was not a single moment in the 150 days of his confinement, even during court appearances or if he was taken out of the facility by Special Agent Bass, that Koray was "at large" or released into the community. He was never "free" in any sense of the word. The use of the phrase "released on bail" implies that the "release" and its conditions were somehow a request by the defendant that the court granted, that Koray chose an environment he saw as more pleasant than the facility for those held under a "detention order", and should live with his choice. There is nothing in the record to support such a claim. The "Release on conditions" order did not release Koray from "official detention". It merely transferred his confinement from one detention facility to another. This order was entered *after* his plea of guilty. Given that his guilt was now established and a sentence of incarceration under the sentencing guidelines was now a certainty, a request *by a defendant* at this point for release from detention was unlikely to be granted. What is clear is that this "Release on conditions" was not for the benefit of the defendant, unlike what is usually true under home confinement or residing with a relative, or confinement to a drug treatment facility. The purpose of the condition that Koray be "confined to the premises" of the halfway house was not to help him; this court ordered confinement's primary purpose was to assure his presence and protect the "safety of . . . the community." (18 U.S.C. §3142(c)(B)(xiv)). Protecting the community from further crimes is a major purpose of a sentence of imprisonment. (See 18 U.S.C. §3553(a)(2)(C) 1988). Since total confinement

at the halfway house served this purpose fully, it is therefore especially unfair not to accord Koray sentence credit.[14]

The greatest disparity caused by the current BOP view urged by the Solicitor General is not even mentioned in the government's brief. *Sentenced* prisoners are permitted to be assigned to halfway houses near the completion of their terms by the BOP. These sentenced prisoners are usually permitted work release and other leaves; they are not totally confined to the premises for their entire stay at the halfway house, as Koray was. If they are so confined to the premises, their conditions of confinement are usually comparable to those imposed on Koray.

The BOP considers the time these sentenced prisoners spend in a halfway house part of their sentence of imprisonment. If Koray had spent the last 5 months of his sentence at the same halfway house, even under less than total confinement (e.g. leaving the premises for work release) and subject to the same operational rules, instead of the 5 months he spent there totally confined to the premises, the BOP would have counted that last five months as part of his sentence. The BOP's interpretation of §3585(b) denies Koray sentence credit simply because he was placed in the halfway house at the wrong time. "This interpretation of the statute would make the award of credit arbitrary, a result not to be presumed lightly."

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[14] As the court of appeals pointed out, there is also "inherent unfairness" in denying sentence credit to a defendant who is so "released" without giving the defendant notice that his "release" will have that result. Pet. App. 23a.

*United States v. Wilson*, 112 S.Ct. at 1354. Nothing in the language of the statute, the language of related statutes, or its legislative history requires this anomalous result. The plain meaning of the statute, the intent of Congress, as well as fairness and reason, require that Koray be given sentence credit for the 150 days at the halfway house where he suffered a total loss of liberty.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 94-790

In The

# Supreme Court of the United States

October Term, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

*Petitioners,*

v.

ZIYA K. KORAY,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

## APPENDIX

[seal]

**U.S. Department of Justice**
Federal Bureau of Prisons

| | |
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| **Program Statement** | **OPI:** CPD<br>**NUMBER:** 7310.02<br>**DATE:** October 19, 1993<br>**SUBJECT:** Community Corrections Center (CCC) Utilization and Transfer Procedure |

1. PURPOSE AND SCOPE. To provide guidelines to staff regarding the effective use of Community Corrections Centers (CCCs). This Program Statement defines placement criteria, requires that staff members start the placement process in a timely manner, and defines the circumstances when inmates may refuse community corrections (CC) programs. It also establishes an operational philosophy for CCC referrals that, whenever possible, eligible inmates are to be released to the community through a CCC, unless there is some impediment as outlined herein.

CCCs provide an excellent transitional environment for inmates nearing the end of their sentences. The level of structure and supervision assures accountability and program opportunities in employment counseling and placement, substance abuse, and daily life skills.

One reason for referring an inmate to a CCC is to increase public protection by aiding the transition of the offender into the community. Participating in community-based transitional services reduces the likelihood of an inmate with limited resources recidivating than might be the case

if the inmate makes an abrupt transition from the institution to the community. While clearly dangerous inmates should be separated from the community until completion of their sentences, other eligible inmates should generally be referred to CCCs to maximize the chances that they will successfully reintegrate into society.

* * *

4. STATUTORY AUTHORITY. 18 U.S.C. Section 3624(c), provides:

> "The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his reentry into the community. The authority provided by this subsection may be used to place a prisoner in *home confinement*. The U.S. Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody."

18 U.S.C. Section 3621(b) provides:

> "The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility . . . the Bureau determines to be appropriate and suitable." A CCC meets the definition of a "penal or correctional facility."

Therefore, the Bureau is not restricted by Section 3624(c) in designating a CCC for an inmate and may place an inmate in a CCC for more than the "last ten per centum of the term," or more than six months, if appropriate.

Section 3624(c), however, does restrict the Bureau in placing inmates on *home confinement* to the last six months or 10 percent of the sentence, whichever is less.

## 5. COMMUNITY-BASED PROGRAMS

a. *Community Corrections Centers (CCC).* CCCs, commonly referred to as "halfway houses," provide suitable residence, structured programs, job placement, and counseling, while the inmates' activities are closely monitored. All CCCs offer drug testing and counseling for alcohol and drug-related problems. During their stay, employed inmates are required to pay a subsistence charge to help defray the cost of their confinement; this charge is 25 percent of their gross salary, not to exceed the average daily cost of their CCC placement. Failure to make subsistence payments may result in disciplinary action.

These contract facilities, located throughout the United States, provide three program components: Community Corrections, Prerelease, and Home Confinement:

(1) The *Community Corrections Component* is designed as the most restrictive option. Except for employment and other structured program activities, an inmate in this component is restricted to the CCC. An inmate will ordinarily be placed in the Community Corrections Component upon arrival at the CCC. This orientation period normally lasts for two weeks or until the inmate has demonstrated to CCC staff the responsibility necessary to function in the community. Based on their professional judgment, CCC staff will determine when an inmate is prepared to advance to the prerelease component.

(2) The *Prerelease Component* is designed to assist inmates making the transition from an institution setting to the community. These inmates have more access to the community and family members through weekend and evening passes.

(3) The *Home Confinement Component* is restricted to inmates who ordinarily are serving the last 10 percent of their sentences not exceeding six months. This is a selective status that is authorized discriminately according to an inmate's adjustment and needs. Inmates are permitted to reside at home and be gainfully employed while continuing in official detention status. Sub-section b.(4) below provides more detail about this program.

* * *

6. RELEASE PLAN. Staff shall begin release planning at an inmate's first team meeting, normally the initial classification, and shall continue throughout the inmate's confinement. The following guidelines apply:

a. Planning early in an inmate's period of confinement is necessary to ensure prerelease needs are identified and appropriate prerelease programs are recommended.

b. Preliminary decisions regarding eligibility for CC programs is to be made well in advance of the last year of confinement.

c. A final and specific prerelease plan, including a decision as to CCC referral, is normally established at a team meeting no later than 11 to 13 months before an inmate's projected release date.

7. CCC CRITERIA AND REFERRAL GUIDELINES. Staff shall make recommendations for CCC placements based on assessments of inmate needs for services, public safety, and the necessity of the BOP to manage its inmate population responsibly. CCCs are a program element and are not to be used as a reward for good institutional behavior, although an inmate's institutional adjustment may be a factor in making a referral determination.

A number of factors must be weighed to determine the length of CCC placement for inmates, including their individual needs and existing community resources. Institution staff make a recommendation for a specific placement date to the CCM office, and Community Corrections staff determine placement dates and closely monitor average lengths of stay to efficiently manage the bedspace usage. Budgetary constraints also are a key consideration and may affect average lengths of stay. CC staff shall make every effort to establish an acceptable date as close to the institution's recommended date as possible. In any event, the acceptance date shall not precede the recommended date.

The following CCC referral guidelines apply:

a. An inmate may be referred up to 180 days, with placement beyond 180 days highly unusual, and only possible with extraordinary justification. In such circumstances, the Warden shall contact the Regional Director for approval and the Chief U.S. Probation Officer in the inmate's sentencing district to determine whether the sentencing judge objects to such placement.

b. The ultimate goal is to maximize each eligible inmate's chances for successful release and a law-abiding life.

c. When an inmate has a history of escape or failure in one or more CCC programs, careful review and consideration should be given regarding the suitability of participation and the length of placement.

d. Inmates with handicaps, minor medical conditions, or disabilities may also be considered for community placement. Inmates are required to assume financial responsibility for their health care while assigned to community programs. When an inmate is unable or unwilling to bear the cost of necessary medical care, the inmate is to be denied placement.

* * *

10. CCC REFERRAL PROCEDURES. Normally 11 to 13 months before each inmate's probable release date, the unit team shall decide whether to refer an inmate to a Community Corrections program.

a. *Referral to CCM.* Staff shall use the Referral Form (BPS-210 (73) Attachment B) when referring an inmate for transfer to a CCC. Information included in the Additional Information (12) and Specific Prerelease Needs (13) sections must be as specific as possible and not just reference the progress report. Attachment B contains instructions for completing the Referral Form and related materials. Signed copies of the "Conditions of Residential Community Programs" (Attachment C) must be included with all CCC referrals. The Warden is the final decision-making

authority for all CCC referrals recommended by the unit team.

If the Warden approves the CCC referral, the unit team shall forward two copies of the Institutional Referral Form and appropriate attachments to the CCM. Two copies of the referral are prepared so that one may be forwarded to the CCC while the CCM retains the other for reference. The referral packet must be forwarded to the CCM at least 60 days prior to the requested placement date. However, earlier referrals are encouraged to facilitate the release process.

If the placement is for 45 days or less, and the release method by parole, a copy of correspondence directed to the U.S. Parole Commission outlining the release plan and requesting parole certificates, as well as copies of U.S. Probation's letter recommending release plan approval, must be included in the referral package.

* * *

e. *Transfer Date.* When CCMs are notified of an inmate's acceptance by a CCC, a transfer date to the CCC is to be established, and the CCM will enter the SENTRY destination assignment transaction. The effective date will be the approved future transfer date.

* * *

Kathleen M. Hawk
Director

[Attachments omitted]

OPERATIONS
MEMORANDUM

DATE: OCTOBER 23, 1989

SUBJECT: CREDIT FOR TIME IN CUSTODY UNDER 18 USC 3585(B)

CANCELLATION DATE: OCTOBER 31, 1990

**********

I. PURPOSE: TO ADVISE STAFF OF THE PROCEDURES FOR THE CREDITING OF JAIL TIME UNDER TITLE 18, U.S. CODE, SECTION 3585(B).

II. DIRECTIVE REFERENCED:

PROGRAM STATEMENT 5880.24, SEPTEMBER 5, 1979, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568".

III. BACKGROUND: PRIOR TO NOVEMBER 1, 1987, JAIL TIME CREDIT, FOR TIME IN CUSTODY BEFORE SENTENCING, WAS CONTROLLED BY TITLE 18 USC, SECTION 3568. AS STATED UNDER THAT SECTION . . . "THE ATTORNEY GENERAL SHALL GIVE ANY SUCH PERSON CREDIT TOWARD SERVICE OF HIS SENTENCE FOR ANY DAYS SPENT IN CUSTODY IN CONNECTION WITH THE OFFENSE OR ACTS FOR WHICH SENTENCE WAS IMPOSED". PROGRAM STATEMENT 5880.24, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568", ESTABLISHED THE PROCEDURES FOR MAKING JAIL TIME CREDIT DETERMINATIONS. HOWEVER, WITH THE IMPLEMENTATION OF THE COMPREHENSIVE CRIME

CONTROL ACT (CCCA) ON NOVEMBER 1, 1987, SECTION 3568 WAS REPEALED FOR OFFENSES COMMITTED ON OR AFTER THAT DATE. FOR OFFENSES COMMITTED PRIOR TO NOVEMBER 1, 1987, THE PROVISIONS OF SECTION 3568 AND PROGRAM STATEMENT 5880.24 REMAIN IN EFFECT.

IV. ACTION: THE FOLLOWING PROVISIONS OF TITLE 18 USC SECTION 3585(B), CONTROL THE CREDITING OF JAIL TIME CREDIT, FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987.

SECTION 3585(B) CREDIT FOR PRIOR CUSTODY –

"A DEFENDANT SHALL BE GIVEN CREDIT TOWARD THE SERVICE OF A TERM OF IMPRISONMENT FOR ANY TIME HE HAS SPENT IN OFFICIAL DETENTION PRIOR TO THE DATE THE SENTENCE COMMENCES –

(1) AS A RESULT OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED; OR

(2) AS A RESULT OF ANY OTHER CHARGE FOR WHICH THE DEFENDANT WAS ARRESTED AFTER THE COMMISSION OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED, THAT HAS NOT BEEN CREDITED AGAINST ANOTHER SENTENCE."

UNDER SECTION 3585(B), AN INMATE WILL RECEIVE JAIL TIME CREDIT ON THE FEDERAL SENTENCE, FOR TIME SPENT IN PRE-SENTENCE CUSTODY IN CONNECTION WITH THE FEDERAL OFFENSE, AND FOR ANY TIME SPENT IN PRE-SENTENCE CUSTODY AFTER THE DATE OF THE FEDERAL OFFENSE, IF

CREDIT IS NOT AWARDED TOWARD SERVICE OF ANOTHER SENTENCE. FOR EXAMPLE, IF AN INMATE IS ARRESTED ON STATE CHARGES, AFTER THE DATE OF THE FEDERAL OFFENSE, AND IT IS DETERMINED THAT THE STATE DID NOT CREDIT THE PRE-SENTENCE CUSTODY TOWARD A STATE SENTENCE, THE TIME SPENT IN STATE PRE-TRIAL CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE, WILL BE CREDITED TOWARD THE FEDERAL SENTENCE.

IN THE FOLLOWING SITUATIONS, IT MAY ALSO BE DETERMINED THAT THE STATE HAS NOT AWARDED CREDIT TOWARD THE STATE SENTENCE IF:

(1) THE STATE CHARGES ARE DISMISSED.

(2) THE STATE SENTENCE IS VACATED WITH FURTHER PROSECUTION DEFERRED, THEREBY EFFECTIVELY VACATING THE STATE'S AWARD OF JAIL CREDIT.

(3) STATE PROBATION IS GRANTED, OR

(4) THE STATE ORDERS THEIR SENTENCES TO RUN CONCURRENTLY WITH THE FEDERAL SENTENCE, AND THE STATE SENTENCE WILL BE ABSORBED PRIOR TO GRANT OF GOOD TIME, RESULTING IN NO BENEFIT FROM THE STATE JAIL TIME.

ORDINARILY, IF A SENTENCE RESULTS FROM STATE CHARGES, THERE WILL BE A PRESUMPTION THAT THE INMATE DID RECEIVE CREDIT FOR THE PRE-SENTENCE TIME. HOWEVER, IF IT CAN BE DEMONSTRATED THAT THE STATE DID NOT CREDIT THE TIME, THE PRE-SENTENCE CREDIT WILL BE

AWARDED FOR TIME IN STATE CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE.

THESE PROCEDURES, UNDER SECTION 3585(B), ONLY APPLY TO OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987. QUESTIONS CONCERNING THESE PROCEDURES MAY BE REFERRED TO ED HAYNES, CHIEF INMATE SYSTEMS BRANCH (FTS 724-3050).

CLAIR A. CRIPE
GENERAL COUNSEL

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Supreme Court, U.S.
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No. 94-790

# In the Supreme Court of the United States

OCTOBER TERM, 1994

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, ET AL., PETITIONERS

*v.*

ZIYA K. KORAY

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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# In the Supreme Court of the United States

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## REPLY BRIEF FOR THE PETITIONERS

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1. Respondent contends that the "plain meaning" of the phrase "official detention" includes restrictive conditions of release on bail, because federal courts act "officially" in setting bail and their bail orders curtail the defendant's liberty. Resp. Br. 26-27; see also Amicus USC Law Center's Post Conviction Justice Project (USC Law Center) Br. 12-13. That contention, however, "overlooks * * * th[e] fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal* v. *United States*, 113 S. Ct. 1993, 1996 (1993); see also *Gustafson* v. *Alloyd Co.*, 115 S. Ct. 1061, 1066 (1995). Here,

"[r]egardless of what the quoted phrase might mean standing alone," *Beecham* v. *United States*, 114 S. Ct. 1669, 1671 (1994), the context in which the phrase "official detention" is used makes clear that it cannot have the expansive meaning suggested by respondent.

Section 3585(b) refers to the legal rules that govern presentence restraints on liberty, because it contemplates credit only for time the defendant "has spent in official detention prior to the date the sentence commences." No federal court may "officially" order the defendant's "detention" before his sentence begins other than in accordance with the Bail Reform Act of 1984, 18 U.S.C. 3141 *et seq.* Under that Act, "[t]he judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community." *United States* v. *Salerno*, 481 U.S. 739, 751-752 (1987). When the judicial officer finds that those factors warrant "detention," the defendant must be placed in the custody of correctional authorities. See 18 U.S.C. 3142(i)(2). Any other resolution of the bail question results in the defendant's "release" either on his own recognizance or subject to specified statutory conditions. See 18 U.S.C. 3142(b) and (c)(1)(B). Indeed, the understanding that pretrial "detention" connotes the denial of bail to a defendant, and his resulting custody by correctional authorities, was reflected in this Court's decisions even before enactment of the Bail Reform Act of 1984. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 531-535 (1979); see also *Block* v. *Rutherford*,

468 U.S. 576, 583 (1984); *Gerstein* v. *Pugh*, 420 U.S. 103, 114 (1975).

Respondent contends that the detention/release dichotomy of the Bail Reform Act of 1984 does not bear on the proper interpretation of 18 U.S.C. 3585(b), because in his view some of the conditions of "release" under the Bail Reform Act are comparable to conditions faced by "detained" prisoners. Resp. Br. 25-26. The bail statute, however, reflects Congress' view that placing a defendant in the custody of correctional authorities (detention) is so far different from other restraints on liberty that it should be used only as a last resort—*i.e.*, when less restrictive conditions, including residence in a halfway house, appear unlikely to assure the defendant's presence or the safety of the community. See 18 U.S.C. 3142(c) and (e); see also *Bell* v. *Wolfish*, 441 U.S. at 546 n.28 ("In the federal system, a detainee is committed to the detention facility only because no other less drastic means can reasonably assure his presence at trial," citing former 18 U.S.C. 3146). That scheme necessarily implies a judgment that conditions of the type imposed by respondent's bail package are less restrictive than detention in the custody of correctional authorities.

The context in which the phrase "official detention" appears in Section 3585(b) is significant for a second reason. By reducing a defendant's "imprisonment" by the amount of time spent in "official detention" before his sentence, Section 3585(b) posits that periods of presentence "detention" are equivalent to the "imprisonment" itself. Crediting time spent on bail against a sentence of "imprisonment," however, would require an apples-and-oranges comparison. Cf. *Jones* v. *Thomas*, 491

U.S. 376, 384 (1989) (noting that it is generally feasible to credit sentences when they are of the same "type," but that it would not be "possible to 'credit' a fine against time in prison"). Federal prisoners, unlike persons released on bail, are always subject to the supervision of correctional authorities. And when federal sentences include the type of community confinement at issue here, they do so as part of a sentence of "probation," not "imprisonment." See Gov't Br. 13-14. The fact that the type of halfway house confinement at issue here "is included as a condition of probation * * * persuasively indicates that Congress considered [that] confinement not to be the equivalent" of imprisonment and therefore "not to come within the ambit of 'official detention.'" *United States* v. *Zackular*, 945 F.2d 423, 425 (1st Cir. 1991).

Section 3585(a) of Title 18 poses a third contextual barrier to respondent's broad reading of the phrase "official detention." Section 3585(a) uses the phrase "official detention facility" to refer to a place where a federal sentence of imprisonment may be served, and the phrase "official detention" in the related provisions of Section 3585(b) must therefore be read to refer to a defendant's imprisonment in such a place. See, *e.g.*, *Gustafson* v. *Alloyd Co.*, 115 S. Ct. at 1066, 1067; *Ratzlaf* v. *United States*, 114 S. Ct. 655, 660 (1994). A sentenced prisoner may serve a federal sentence only while "committed to the custody of the Bureau of Prisons," 18 U.S.C. 3621(a), which by statute must "designate" a penal or correctional facility "that the Bureau determines to be appropriate and suitable" for the service of each inmate's sentence of imprisonment. 18 U.S.C. 3621(b). Thus, a defendant who is not in the custody of

correctional authorities is not subject to "official detention" within the meaning of Section 3585(b).

Respondent notes (Resp. Br. 12-16, 36; see also USC Br. 6-8)) that the Bureau of Prisons has statutory authority to permit service of a defendant's sentence in work release or a halfway house, see 18 U.S.C. 3622, 3624, and that the Bureau has issued a Program Statement permitting certain federal prisoners to serve the last part of their sentences of imprisonment in halfway houses. See Program Statement 7310.02 (Oct. 19, 1993).[1] While that is true, it does not help respondent's case. Our position is not that a halfway house can never be a "penal or correctional facility" where a federal sentence of imprisonment may be served, or that residence there can never amount to "official detention." The Bureau of Prisons designates inmates to a wide variety of institutions that subject the inmates to varying degrees of restraint on the basis of the Bureau's assessment of security or other needs for each inmate. See Gov't Br. 15-16. The only factors that unify those institutions are that (1) the inmates are in the legal custody of correctional personnel, who have "full discretion to control th[eir] conditions of confinement," *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976); see also *Bell* v. *Wolfish*, 441 U.S. at 544-548 (similar discretion with respect to pre-trial detainees who are denied bail), (2) the inmates are subject to summary reassignment to any other facility within

[1] Program Statement 7310.02 is reprinted as an appendix to respondent's brief. The provisions of subchapter C of chapter 229, 18 U.S.C. 3621 *et seq.*, which govern the implementation of a term of imprisonment, are reprinted in an appendix to this brief.

the system, cf. *Meachum* v. *Fano*, 427 U.S. 215, 224-229 (1976), and (3) the inmates are subject to the Bureau's disciplinary procedures. Absent the Bureau's identity as legal custodian, a facility, standing alone, is not properly viewed as a place of "official detention."[2]

The identity of the custodian has legal as well as practical significance. Because respondent was not in the custody of the Bureau of Prisons, he could not have been summarily reassigned to a substantially less agreeable setting unless a judicial officer revoked respondent's bail or modified the conditions of his release. See 18 U.S.C. 3142(c)(3); see also *Randall* v. *Whelan*, 938 F.2d 522, 525 (4th Cir. 1991). Moreover, the statutory provisions and Program Statement on which respondent relies are subject to other conditions (apart from legal custody by the Bureau of Prisons) that respondent did not meet. For example, Program Statement 7310.02 provides that a halfway house or home confinement may be used as a transitional environment in order to ease an inmate's

[2] Amicus USC Law Center erroneously implies (USC Br. 6-7) that, by enacting 18 U.S.C. 4082, Congress has adopted a definition of "correctional facility" that categorically includes halfway houses irrespective of whether the defendant is in the legal custody of the Bureau of Prisons. Section 4082, which is reprinted in full in the appendix to this brief, merely provides that *when* the Attorney General (or the Bureau as her designee) has designated a facility for the confinement of a prisoner under her custody, a willful failure to remain in that facility will be deemed an escape. Not only does the title of Section 4082 make clear that the statute deals with "[c]ommitment[s] to Attorney General," but the statute's definition of "facility" to include a "residential community treatment center" is expressly limited by the phrase "[a]s used in this section." 18 U.S.C. 4082(c).

re-entry into society at the *end* of his sentence of imprisonment. See also 18 U.S.C. 3624(c); *Ramsey* v. *Brennan*, 878 F.2d 995, 997 (7th Cir. 1989) (policy of "facilitat[ing] the re-entry of convicts into society by making the last stage of their confinement transitional * * * has no application to a prisoner moving in the opposite direction"). Similarly, under Section 3622 the Bureau may furlough a prisoner in limited circumstances "if there is reasonable cause to believe that [he] will honor the trust to be imposed in him," and when it does so the Bureau may impose on him restrictions similar to the least restrictive bail conditions available under the Bail Reform Act. See 28 C.F.R. 570.36(d) (1994) (listing typical conditions of furlough). Nothing in those provisions supports the inference that residence in a halfway house, home confinement, or a furlough must *always* count as "imprisonment," even when the conditions that call those special provisions into operation are not satisfied.

Respondent also contends that the Bureau's interpretation of Section 3585(b) and its decision to deny him sentence credit conflict with its longstanding policy of granting credit to prisoners who were held in state custody before they were sentenced for a federal crime. Resp. Br. 16-17 & n.6; see also USC Br. 22-23. That is not correct. The Bureau's decision to grant credit to some state prisoners is supported by the legislative history of the Bail Reform Act of 1966, which made clear Congress' understanding that credit would be available for state custody in certain circumstances.[3]

[3] See H.R. Rep. No. 1541, 89th Cong., 2d Sess. 5 (1966) (credit would be available "for time spent in custody while

Moreover, the Bureau does not grant credit for state pre-trial detention unless the state judicial officer who determined the question of bail remanded the defendant to the custody of state correctional authorities—*i.e.*, no state prisoner is "detained" in an "official" way unless he is denied bail in accordance with applicable laws governing pre-trial restraints on liberty. That is the same definition of "official detention" that the Bureau applies to defendants who were arrested by federal authorities. By contrast, respondent was not denied bail, and he can point to nothing in the legislative history of the credit statute that suggests that Congress intended that credit be granted to one in his position. Indeed, respondent does not address our submission (Gov't Br. 17-21) that the history of federal statutes granting credit toward a sentence of imprisonment—particularly the fact that Congress has twice revised the credit statute at the same time it undertook to revise the bail laws—shows that Congress conceived of that credit as a corollary of a judge's decision to deny a defendant bail in accordance with applicable law.

2. Respondent does make one historical argument, but it does not assist him. As we demonstrated in our opening brief (Br. 20-21), by the time Congress enacted the current version of the credit provision in 1984, the courts of appeals had uniformly held that the phrase "in custody" in the predecessor statute did not

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awaiting trial where a defendant may have been originally arrested and held in custody on a State charge and eventually turned over to the Federal Government for prosecution of a Federal violation"); see also *id.* at 16 (credit available "for time spent in State custody on a charge which subsequently evolves as a Federal offense").

include restrictions imposed on a defendant's liberty as a condition of his release on bail. Respondent agrees with us (Resp. Br. 17), and with every court of appeals to consider the question, that the phrase "official detention" in Section 3585 means the same thing as the phrase "in custody" in the predecessor statute. Because respondent concedes that Congress' intent was to reenact the same understanding of "custody" that existed under the predecessor statute, this Court should "apply the presumption that Congress was aware of the[] earlier judicial interpretations and, in effect, adopted them" in the new credit provision. *Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2043 (1993); *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978).

Respondent claims that there should be no presumption that Congress reenacted the rule that time spent while released on bail is not creditable, because "the cases decided under the predecessor statute did not deal with defendants in halfway house confinement." Resp. Br. 19. The reenactment doctrine, however, does not impute to Congress knowledge of the specific facts of each case decided under the predecessor statute, but only knowledge of the rule of law or "test" adopted by those cases. Cf. *Fogerty* v. *Fantasy, Inc.*, 114 S. Ct. 1023, 1032 (1994). Before the credit statute took its current form in 1984, the courts of appeals had adopted a categorical rule that denied credit under the predecessor statute to prisoners who secured bail.[4] As this Court made

[4] See *Polakoff* v. *United States*, 489 F.2d 727, 730 (5th Cir. 1974) (Wisdom, J.) (time spent on "highly restricted bond" not creditable as "custody"); see also *United States* v. *Robles*, 563 F.2d 1308, 1309 (9th Cir. 1977) ("time spent on bail or on bond

clear in *United States* v. *Wilson*, 112 S. Ct. 1351, 1355 (1992) (internal quotation marks omitted), "[i]t is not lightly to be assumed that Congress intended to depart" from the rule followed under the predecessor statute when it enacted the credit provision of Section 3585(b).[5]

3. The language and history of Section 3585(b) establish that Congress intended that a defendant who is released on bail not receive sentence credit under Section 3585(b). If there is any need for further

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pending appeal is not time served 'in custody' "), cert. denied, 435 U.S. 925 (1978); *Ortega* v. *United States*, 510 F.2d 412, 413 (10th Cir. 1975) ("custody" relates "to actual custodial incarceration" not "the time a criminal defendant is free on bond"); *United States* v. *Peterson*, 507 F.2d 1191, 1193 (D.C. Cir. 1974).

[5] Respondent notes that the Bail Reform Act uses the term "custody" in describing certain conditions of release. See, *e.g.*, 18 U.S.C. 3142(c)(1)(B)(i) (court may release defendant to the custody of responsible person). He contends that our argument that "custody" and "official detention" are synonymous must mean that an order providing for a form of "custody" under the Bail Reform Act amounts to "official detention" under Section 3585(b). Resp. Br. 18. The problem with that argument is that we have never contended that the word "custody" means the same thing in all federal statutes in which it is used. Our position instead is that *as used in the predecessor credit statute*, the word "custody" was intended by Congress, and was uniformly construed by the courts before 1984, to describe only cases in which a defendant was not released on bail—and that that narrow meaning should therefore inform the Court's construction of the phrase "official detention" in the new statute. It is true that in some other statutory contexts, see *e.g.*, *Maleng* v. *Cook*, 490 U.S. 488, 491 (1989) (habeas corpus), the term "custody" has a broader meaning, but even respondent does not contend that the broadest legal definition of the term "custody" should be applied to the credit statute.

definition of the statute, however, deference is owed to the Bureau of Prisons' interpretation. Respondent fails to show that the Bureau's interpretation of "official detention" is not entitled to deference. First, respondent has not demonstrated that Congress had a clear and unambiguous intention to award credit to defendants who have been released on bail under restrictive conditions. Respondent and his amicus simply assume that Congress must have intended that credit be granted to one in respondent's position, because some dictionary definitions of the phrase "official detention" are broad enough to encompass respondent's conditions of bail. Resp. Br. 26-27; see also USC Br. 12-13. As this Court has noted, however, "[t]he existence of alternative dictionary definitions of the" relevant statutory terms, "each making some sense under the statute, itself indicates that the statute is open to interpretation" by the agency. *National R.R. Passenger Corp.* v. *Boston & Maine Corp.*, 112 S. Ct. 1394, 1402 (1992); see also *Sullivan* v. *Everhart*, 494 U.S. 83, 91-92 (1990).

Adopting the reasoning of the court of appeals (Pet. App. 9a), respondent also argues that the Bureau's interpretation is not entitled to deference because it was not embodied in a legislative rule subject to notice-and-comment rulemaking. Resp. Br. 22-23. That is not a requirement for deference, however. Legislative rules, issued after notice and comment pursuant to delegated authority, have the binding force of law and are "entitled to more than mere deference or weight." *Batterton* v. *Francis*, 432 U.S. 416, 425-426 & n.9 (1977). The Bureau, however, has never contended that its Program Statements dealing with sentence credit *are* law, and its failure to engage

in notice-and-comment rulemaking is therefore irrelevant. The Bureau's Program Statements instead are informal pronouncements akin to "interpretive rules" that "do not require notice-and-comment," *Shalala* v. *Guernsey Memorial Hosp.*, 115 S. Ct. 1232, 1239 (1995), but which are nonetheless entitled "to some weight on judicial review." *Martin* v. *OSHRC*, 499 U.S. 144, 157 (1991).

Respondent also relies on the court of appeals' view that the Bureau has abandoned the interpretation of custody that it followed under the predecessor statute. Resp. Br. 20-21. The change in policy, however, concerns only a limited class of people who were ordered to spend nights or weekends in the custody of correctional authorities. Respondent is not a member of that class and the change did not implicate him or those in his situation at all, because it has always been the Bureau's view that "[t]ime spent * * * in a residential community center * * * as a condition of bail or bond * * * is not creditable as jail time." Program Statement No. 5880.24 (Sept. 5, 1979) (Pet. App. 37a); cf. *Ehlert* v. *United States*, 402 U.S. 99, 105-107 (1971). Thus, with respect to the issue raised by the facts of this case, the Bureau's policy has remained consistent and unchanged. Indeed, in denying respondent's administrative request for sentence credit, the warden relied on the Program Statement issued under the predecessor statute as authority for his action. J.A. 30.[6]

[6] As we explain in our opening brief (Br. 23-25), in 1975 the Bureau revised its policy with respect to jailed defendants who are nominally released on bail, after a federal court rejected the Bureau's argument that credit was not warranted even in those circumstances. Respondent does not challenge our explanation, does not offer any example in which that policy

4. Respondent also suggests that the rule of lenity requires adoption of his interpretation of Section 3585(b), because "there is a split of authority in the [c]ircuits concerning the reach of 'official detention.'" Resp. Br. 34 & n.13. There is no ambiguity in this case of the type that calls into play the rule of lenity. Unlike the principle of administrative deference, which uses the concept of "ambiguity" to recognize that Congress intends that administrative agencies will fill in the details of how statutes operate, the rule of lenity applies only if a statute is "ambiguous" in the special sense that "after seizing every thing from which aid can be derived," *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (internal quotation marks and brackets omitted); see also *Chapman* v. *United States*, 500 U.S. 453, 463 (1991), the court can "make no more than a guess as to what Congress intended." *Ladner* v. *United States*, 358 U.S. 169, 178 (1958). As we have explained, the

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was applied to anyone beyond the limited context of defendants who were ordered to spend time in the custody of correctional authorities, and does not give any legal reason why a policy adopted under the perceived compulsion of a federal district court should be deemed to embody the *Bureau's* view of the law. Cf. *United States* v. *Williams*, 112 S. Ct. 1735, 1740 (1992). Respondent simply claims without elaboration that the Bureau was "mistaken" in changing position, and that its purported error means that it is not entitled to any deference. Resp. Br. 21-22 n.9. But an agency "is not estopped from changing a view [it] believes to have been grounded upon a mistaken legal interpretation." *Good Samaritan Hosp.* v. *Shalala*, 113 S. Ct. 2151, 2161 (1993). Any change in the agency's position "might reduce, but would not eliminate," the deference owed to its interpretation. *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 817 (1995).

language, structure, history, and consistent administrative interpretation of Section 3585(b) and of related sentencing statutes all support the conclusion that restrictive conditions of bail are not "official detention." This accordingly is not a case in which the Court is left with an ambiguous statute "at the end of the process of construing what Congress has expressed." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961); see also *National Organization for Women, Inc.* v. *Scheidler*, 114 S. Ct. 798, 806 (1994).

That conclusion is not changed by the division of authority on which respondent relies. A statute "is not " 'ambiguous' for purposes of lenity merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government," or because there is "a division of judicial authority" over the proper construction. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990); see also *Smith* v. *United States*, 113 S. Ct. at 2059. If that were sufficient, "one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one." *Moskal* v. *United States*, 498 U.S. at 108; see also *Chapman* v. *United States*, 500 U.S. at 467-468.

5. Amicus USC Law Center contends that the Bureau of Prisons' interpretation of Section 3585(b) should be rejected, because it would raise "serious constitutional questions" under the equal protection component of the Due Process Clause of the Fifth Amendment. USC Br. 20. According to USC Law Center, the legislative scheme irrationally treats people like respondent differently from sentenced prisoners who may serve parts of their sentences in a

halfway house and from prisoners who are granted credit for periods of state custody. *Id.* at 21-23.[7]

As this Court has often emphasized, legislative classifications are "presumed to be valid," *Lyng* v. *Automobile Workers*, 485 U.S. 360, 370 (1988) (internal quotation marks omitted); see also *Heller* v. *Doe*, 113 S. Ct. 2637, 2643 (1993), especially "where the legislature must necessarily engage in a process of line-drawing," *FCC* v. *Beach Communications*, 113 S. Ct. 2096, 2102 (1993) (internal quotation marks omitted). That process "inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration." *Ibid.*; see also *Chapman* v. *United States*, 500 U.S. at 464-465 (rational basis review applies to sentencing statute). Indeed, Congress may choose to further its object by drawing a line that simply serves adminis-

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[7] Although respondent raised an equal protection claim in his petition for habeas corpus, he waived that claim in the court of appeals (Pet. App. 3a n.1) and he has not renewed it here. No equal protection question as to his individual circumstances is therefore properly before the Court. See, *e.g.*, *United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (noting that the court does not decide issues raised by amici that were not decided by the court of appeals or argued by the interested party); *Bell* v. *Wolfish*, 441 U.S. 520, 531 n.13 (1979) (same). The only equal protection question before the Court is whether the statutory classification is sufficiently likely to be *facially* unconstitutional that the Court should reject the government's interpretation of the credit statute. Cf. *Chapman* v. *United States*, 500 U.S. 453, 464-466 (1991); *Schall* v. *Martin*, 467 U.S. 253, 268-269 n.18 (1984). Amicus has not demonstrated that here.

trative convenience. *Vance* v. *Bradley*, 440 U.S. 93, 109 (1979); see also *United States* v. *Locke*, 471 U.S. 84, 93 (1985) (statute requiring filing of claim "prior to December 31" not irrational when applied to bar claimants who filed *on* December 31); *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 592 (1979).

It was not irrational for Congress to provide credit only for defendants who are remanded to the custody of correctional authorities, since it will generally be true that defendants who are granted conditional release do not suffer, as a class, so great a deprivation of liberty as those who are remanded. Even if some forms of release on bond could be viewed as functionally equivalent to incarceration, as amicus USC Law Center contends, Congress was "not required to take an all-or-nothing approach," but could proceed "one step at a time, addressing itself to the phase of the problem that seem[ed] most acute to the legislative mind." *Bowen* v. *Owens*, 476 U.S. 340, 347 (1986) (quoting *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955)); *FCC* v. *Beach Communications*, 113 S. Ct. at 2102. Contrary to amicus' submission, no principle of equal protection compelled Congress to "accept[] an intermediate point on an uncertain line," *New York Transit Authority* v. *Beazer*, 440 U.S. at 592, by choosing a functional case-by-case approach to the credit issue.[8]

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[8] Amicus notes (USC Br. 15 n.9) that the Eleventh Circuit accepted an equal protection argument in *Johnson* v. *Smith*, 696 F.2d 1334 (1983). That ruling was based solely on a concession by the attorney for the government, which the court treated as a waiver of the government's equal protection arguments. *Id.* at 1338-1339 & n.5. When the merits of the equal protection argument have been properly presented, the courts of appeals have uniformly rejected it, concluding that

6. Respondent emphasizes the purportedly limited rule announced by the decision below, which he believes will result in few awards of credit, and he contends that the Bureau of Prisons should have no difficulty applying that rule simply by consulting the terms of the bail form to ascertain whether the express terms of that order impose "total confinement." Resp. Br. 29-30, 32-34; see also USC Br. 23-26 (Bureau can apply court of appeals' holding by looking at "court files").

Respondent did not seek habeas corpus on the theory that the order setting his conditions of release, by itself, demonstrated his entitlement to credit; he contended instead that the restrictions actually placed on his liberty were functionally no different from incarceration. See J.A. 23. Nor did the court of appeals rule for respondent on the basis of the text of his bail form; had the court done so there would have been no need to remand for a hearing on the restrictiveness of the conditions under which respondent lived while on bail. Pet. App. 23a-24a. And

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pre-trial and post-sentence claimants of credit are not similarly situated. See, *e.g.*, *Moreland* v. *United States*, 968 F.2d 655, 660 (8th Cir.) (en banc), cert. denied, 113 S. Ct. 675 (1992); *United States* v. *Edwards*, 960 F.2d 278, 283-285 (2d Cir. 1992); *United States* v. *Woods*, 888 F.2d 653, 656-657 (10th Cir. 1989), cert. denied, 494 U.S. 1006 (1990); *Ramsey* v. *Brennan*, 878 F.2d 995, 997 (7th Cir. 1989); see also *Edwards* v. *United States*, 41 F.3d 154, 157 (3d Cir. 1994), petition for cert. filed, No. 94-8467 (Mar. 1, 1995); *United States* v. *Smith*, 869 F.2d 835, 837 (5th Cir. 1989). The Eleventh Circuit has recently emphasized the limited scope of its *Johnson* decision in rejecting, on the merits, the equal protection claim of a prisoner who, like respondent, was required to reside at a halfway house as a condition of bail. *Dawson* v. *Scott*, No. 93-6240 (Apr. 6, 1995), slip op. 19-30 & n.20.

reliance on the bail order alone would rarely be sufficiently informative about the actual conditions of release. Bail orders must describe whether the defendant was "detained" or "released," but the particular wording of conditions of release is up to the judicial officer. Even a condition of "total confinement" may well be subject to exceptions for outings with relatives, meetings with counsel or law enforcement agents, or for other purposes. In practice, the restriction may be far less onerous than appears from the face of the order.

The fact that few prisoners may receive credit at the conclusion of litigation does not eliminate the substantial costs of the rule adopted by the court of appeals. Experience teaches that prisoners who were subjected to various forms of presentence constraint will actively litigate claims to credit based on their individual circumstances.[9] Indeed, after its decision in this case, the court of appeals considered whether a requirement of home confinement as a condition of bail required an award of sentencing credit. *Edwards* v. *United States*, 41 F.3d 154 (3d Cir. 1994), petition

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[9] See, *e.g.*, *Edwards* v. *United States*, 41 F.3d at 155-156 (home confinement as a condition of bail); *Fraley* v. *Bureau of Prisons*, 1 F.3d 924, 925 (9th Cir. 1993) (per curiam) (prisoners required to stay at home pending trial); *Lahey* v. *Floyd*, 992 F.2d 234, 235-236 (9th Cir. 1993) (same); *United States* v. *Browning*, 761 F. Supp. 681, 682 (C.D. Cal. 1991) (same); see also *Grady* v. *Crabtree*, 958 F.2d 874, 875 (9th Cir. 1992) (prisoner confined at halfway house as a condition of post-trial probation); *United States* v. *Freeman*, 922 F.2d 1393, 1396-1397 (9th Cir. 1991) (prisoner claiming credit for time on pre-trial "probation"); *Malosh* v. *Crabtree*, 758 F. Supp. 620, 621 (D. Or. 1991) (prisoner required to reside on a military base as a condition of pre-trial release).

for cert. filed, No. 94-8467 (Mar. 1, 1995). The court rejected the claim only after analyzing in detail the extent to which the Pretrial Services Agency, in whose custody the defendant had been placed, actually allowed the defendant to leave his home for social occasions or choir practice. *Id.* at 156-157.[10]

Finally, respondent contends that information required by the court of appeals' rule should be easily available to the Bureau from court files. As was the case here (J.A. 9), however, most defendants released on bail with a condition of community confinement are placed in the legal custody of the Pretrial Services Agency for the district of their residence, which functions under the supervision of the court pursuant to specific statutory authority. See 18 U.S.C. 3152 *et seq.* Information collected by that agency is not freely available to the government. See 18 U.S.C. 3153(c)(1). While amicus contends that Presentence Investigation Reports prepared by the Probation Department "should" easily contain information about the defendant's conditions of release (USC Br. 24), there is no basis for assuming that the full range of information needed to satisfy the court of appeals' approach will be ascertainable from those reports (*id.* at 24-25).[11] As we have already

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[10] The *Edwards* case also illustrates the dangers of forum shopping and repetitive litigation that nationwide adoption of a "functional" approach to the credit issue is likely to create, because the defendant relied on the Third Circuit's approach to relitigate a claim that had already been rejected on the merits by the Second Circuit. See *United States* v. *Edwards*, 960 F.2d at 282-283.

[11] Amicus also mistakenly suggests (USC Br. 24) that by requiring that the presentence report reflect the defendant's adjustment to supervision, the Administrative Office of the

noted, that was not the approach taken by the court of appeals nor is it one that is likely to be workable in light of the flexibility available to courts in framing conditions of release under the Bail Reform Act of 1984.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

APRIL 1995

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United States Courts has required a detailed description of any conditions of bail. As the Manual cited by amicus makes clear, what the report must describe is the defendant's attitudinal response to supervision, not the details of his bail package:

> If, as a condition of release, the defendant has been under pretrial supervision, describe the defendant's performance. Positive adjustment, such as payment of restitution to the victim or successful completion of a residential substance abuse program, is included as well as negative adjustment[,] such as positive urinalysis or failure to report to the pretrial services officer as directed.

Administrative Office of the United States Courts, *The Presentence Investigation Report for Defendants Sentenced Under the Sentencing Reform Act of 1984* (Publication 107) at II-34 (rev. Mar. 1992). The only reference to bail that the report usually contains is that the "face sheet" or cover page sets forth a one- or two-line summary of the bail order. See *id.* at II-25 to II-26. The report prepared for respondent is typical of the minimal level of detail that is actually provided. Under the heading "custodial status" that report stated as follows: "Personal Recognizance coupled with Pre-trial Service supervision and residency at Volunteers of America." See Presentence Investigation Report 1 (Sept. 16, 1991).

## APPENDIX

Title 18, United States Code (1988 & Supp. V 1993)*, provides:

### CHAPTER 229—POSTSENTENCE ADMINISTRATION

### SUBCHAPTER C—IMPRISONMENT

**§ 3621. Imprisonment of a convicted person**

**(a) Commitment to custody of Bureau of Prisons.**—A person who has been sentenced to a term of imprisonment pursuant to the provisions of subchapter D of chapter 227 shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624.

**(b) Place of imprisonment.**—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the Bureau determines to be appropriate and suitable, considering—

(1) the resources of the facility contemplated;

* As amended by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1801.

(2) the nature and circumstances of the offense;

(3) the history and characteristics of the prisoner;

(4) any statement by the court that imposed the sentence—

(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or

(B) recommending a type of penal or correctional facility as appropriate; and

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28.

In designating the place of imprisonment or making transfers under this subsection, there shall be no favoritism given to prisoners of high social or economic status. The Bureau may at any time, having regard for the same matters, direct the transfer of a prisoner from one penal or correctional facility to another. The Bureau shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse.

**(c) Delivery of order of commitment.**—When a prisoner, pursuant to a court order, is placed in the custody of a person in charge of a penal or correctional facility, a copy of the order shall be delivered to such person as evidence of this authority to hold the prisoner, and the original order, with the return endorsed thereon, shall be returned to the court that issued it.

**(d) Delivery of prisoner for court appearances.**—The United States marshal shall, without charge, bring a prisoner into court or return him to a prison facility on order of a court of the United States or on written request of an attorney for the Government.

**(e) Substance abuse treatment.**—

**(1) Phase-in.**—In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare)—

(A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;

(B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and

(C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

**(2) Incentive for prisoners' successful completion of treatment program.**—

**(A) Generally.**—Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program

of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

**(B) Period of custody.**—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

**(3) Report.**—The Bureau of Prisons shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives on January 1, 1995, and on January 1 of each year thereafter, a report. Such report shall contain—

(A) a detailed quantitative and qualitative description of each substance abuse treatment program, residential or not, operated by the Bureau;

(B) a full explanation of how eligibility for such programs is determined, with complete information on what proportion of prisoners with substance abuse problems are eligible; and

(C) a complete statement of to what extent the Bureau has achieved compliance with the requirements of this title.

**(4) Authorization of appropriations.**—There are authorized to be appropriated to carry out this subsection—

.(A) $13,500,000 for fiscal year 1996;

(B) $18,900,000 for fiscal year 1997;

(C) $25,200,000 for fiscal year 1998;

(D) $27,000,000 for fiscal year 1999; and

(E) $27,900,000 for fiscal year 2000.

**(5) Definitions.**—As used in this subsection—

(A) the term "residential substance abuse treatment" means a course of individual and group activities, lasting between 6 and 12 months, in residential treatment facilities set apart from the general prison population—

(i) directed at the substance abuse problems of the prisoner; and

(ii) intended to develop the prisoner's cognitive, behavioral, social, vocational, and other skills so as to solve the prisoner's substance abuse and related problems;

(B) the term "eligible prisoner" means a prisoner who is—

(i) determined by the Bureau of Prisons to have a substance abuse problem; and

(ii) willing to participate in a residential substance abuse treatment program; and

(C) the term "aftercare" means placement, case management and monitoring of the participant in a community-based substance abuse treatment program when the participant leaves the custody of the Bureau of Prisons.

**(6) Coordination of Federal assistance.**—The Bureau of Prisons shall consult with the Department of Health and Human Services concerning substance abuse treatment and related services and the incorporation of applicable components of existing comprehensive approaches including relapse prevention and aftercare services.

**§ 3622. Temporary release of a prisoner**

The Bureau of Prisons may release a prisoner from the place of his imprisonment for a limited period if such release appears to be consistent with the purpose for which the sentence was imposed and any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2), if such release otherwise appears to be consistent with the public interest and if there is reasonable cause to believe that a prisoner will honor the trust to be imposed in him, by authorizing him, under prescribed conditions, to—

(a) visit a designated place for a period not to exceed thirty days, and then return to the same or another facility, for the purpose of—

(1) visiting a relative who is dying;

(2) attending a funeral of a relative;

(3) obtaining medical treatment not otherwise available;

(4) contacting a prospective employer;

(5) establishing or reestablishing family or community ties; or

(6) engaging in any other significant activity consistent with the public interest;

(b) participate in a training or educational program in the community while continuing in official detention at the prison facility; or

(c) work at paid employment in the community while continuing in official detention at the penal or correctional facility if—

(1) the rates of pay and other conditions of employment will not be less than those paid or provided for work of a similar nature in the community; and

(2) the prisoner agrees to pay to the Bureau such costs incident to official detention as the Bureau finds appropriate and reasonable under all the circumstances, such costs to be collected by the Bureau and deposited in the Treasury to the credit of the appropriation available for such costs at the time such collections are made.

**§ 3623. Transfer of a prisoner to State authority**

The Director of the Bureau of Prisons shall order that a prisoner who has been charged in an indictment or information with, or convicted of, a State felony, be transferred to an official detention facility within such State prior to his release from a Federal prison facility if—

(1) the transfer has been requested by the Governor or other executive authority of the State;

(2) the State has presented to the Director a certified copy of the indictment, information, or judgment of conviction; and

(3) the Director finds that the transfer would be in the public interest.

If more than one request is presented with respect to a prisoner, the Director shall determine which request should receive preference. The expenses of such transfer shall be borne by the State requesting the transfer.

**§ 3624. Release of a prisoner**

**(a) Date of release.**—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

**(b) Credit toward service of sentence for satisfactory behavior.—**

(1) A prisoner (other than a prisoner serving a sentence for a crime of violence) who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of the prisoner's life, shall receive credit toward the service of the prisoner's sentence, beyond the time served, of fifty-four days at the end of each year of

the prisoner's term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, the prisoner has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. A prisoner who is serving a term of imprisonment of more than 1 year for a crime of violence, other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with such institutional disciplinary regulations. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Credit that has not been earned may not later be granted. Credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence.

(2) Credit toward a prisoner's service of sentence shall not be vested unless the prisoner has earned or is making satisfactory progress toward a high school diploma or an equivalent degree.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

**(c) Pre-release custody.**—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

**(d) Allotment of clothing, funds, and transportation.**—Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

**(e) Supervision after release.**—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned, in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

**(f) Mandatory functional literacy requirement.—**

(1) The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

(2) Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

(3) As used in this section, the term "functional literacy" means—

(A) an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

(B) functional competency or literacy on a nationally recognized criterion-referenced test; or

(C) a combination of subparagraphs (A) and (B).

(4) Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

(5) The Chief Executive Officer of each institution shall have authority to grant waivers for good cause as determined and documented on an individual basis.

(6) A report shall be provided to Congress on an annual basis summarizing the results of this program, including the number of inmate participants, the number successfully completing the program, the number who do not successfully complete the program, and the reasons for failure to successfully complete the program.

**§ 3625. Inapplicability of the Administrative Procedure Act**

The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.

**§ 3626. Appropriate remedies with respect to prison crowding**

**(a) Requirement of showing with respect to the plaintiff in particular.—**

**(1) Holding.**—A Federal court shall not hold prison or jail crowding unconstitutional under the eighth amendment except to the extent that an individual plaintiff inmate proves that the crowding causes the infliction of cruel and unusual punishment of that inmate.

**(2) Relief.**—The relief in a case described in paragraph (1) shall extend no further than necessary to remove the conditions that are causing the cruel and unusual punishment of the plaintiff inmate.

**(b) Inmate population ceilings.—**

**(1) Requirement of showing with respect to particular prisoners.**—A Federal court shall not place a ceiling on the inmate population of any Federal, State, or local detention facility as an equitable remedial measure for conditions that violate the eighth amendment unless crowding is inflicting cruel and unusual punishment on particular identified prisoners.

**(2) Rule of construction.**—Paragraph (1) shall not be construed to have any effect on Federal judicial power to issue equitable relief other than

that described in paragraph (1), including the requirement of improved medical or health care and the imposition of civil contempt fines or damages, where such relief is appropriate.

**(c) Periodic reopening.**—Each Federal court order or consent decree seeking to remedy an eighth amendment violation shall be reopened at the behest of a defendant for recommended modification at a minimum of 2-year intervals.

* * * * *

**CHAPTER 305—COMMITMENT AND TRANSFER**

**§ 4082. Commitment to Attorney General; residential treatment centers; extension of limits of confinement; work furlough**

(a) The willful failure of a prisoner to remain within the extended limits of his confinement, or to return within the time prescribed to an institution or facility designated by the Attorney General, shall be deemed an escape from the custody of the Attorney General punishable as provided in chapter 35 of this title.

(b)(1) The Attorney General shall, upon the request of the head of any law enforcement agency of a State or of a unit of local government in a State, make available as expeditiously as possible to such agency, with respect to prisoners who have been convicted of felony offenses against the United States and who are confined at a facility which is a residential community treatment center located in the geographical area in which such agency has jurisdiction, the following information maintained by the Bureau of Prisons (to the extent that the Bureau of Prisons maintains such information)—

(A) the names of such prisoners;

(B) the community treatment center addresses of such prisoners;

(C) the dates of birth of such prisoners;

(D) the Federal Bureau of Investigation numbers assigned to such prisoners;

(E) photographs and fingerprints of such prisoners; and

(F) the nature of the offenses against the United States of which each such prisoner has been convicted and the factual circumstances relating to such offenses.

(2) Any law enforcement agency which receives information under this subsection shall not disseminate such information outside of such agency.

(c) As used in this section—

the term "facility" shall include a residential community treatment center; and

the term "relative" shall mean a spouse, child (including stepchild, adopted child or child as to whom the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person who, though not a natural parent, has acted in the place of a parent), brother, or sister.

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No. 94-790

# In The Supreme Court of the United States

October Term, 1994

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
Petitioners,

v.

ZIYA K. KORAY,
Respondent.

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF OF *AMICUS CURIAE*, THE USC LAW CENTER'S POST-CONVICTION JUSTICE PROJECT, IN SUPPORT OF RESPONDENT

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18 U.S.C.A. § 4082(b) (West 1969) . . . . . 6

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Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976 . . . . . 7

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*Other Authorities:*

Administrative Office of the United States Courts, Division of Probation, The Presentence Investigation Report (Publication 105) (1984) . . . . . 24

Administrative Office of the United States Courts, Probation and Pretrial Services Division, The Presentence Investigation Report for Defendants Sentenced Under the Sentencing Reform Act of 1984 (Publication 107) (rev. Mar. 1992) . . . . . 24

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## BRIEF OF *AMICUS CURIAE*, THE USC LAW CENTER'S POST-CONVICTION JUSTICE PROJECT, IN SUPPORT OF RESPONDENT

### INTEREST OF *AMICUS CURIAE*

Both the petitioner and the respondent have consented to the participation of *amicus curiae* in this case. Their letters of consent are on file with this Court.

The Post-Conviction Justice Project is a clinical program at the University of Southern California Law Center. Since 1981, students and faculty in the Project have provided legal assistance to federal inmates. The Project affords these services primarily to inmates incarcerated at the Federal Correctional Institution at Terminal Island, California, pursuant to a contract with the Federal

Bureau of Prisons.[1]

The Project is greatly concerned that inmates may improperly be denied credit for time spent in forced residence at community corrections centers[2] prior to sentencing. Students in the Project have argued (under faculty supervision) several court of appeals cases addressing the issue that is now before this Court. *See Mills v. Taylor*, 967 F.2d 1397 (9th Cir. 1992); *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990). Because of the importance of this issue to clients represented by the Project, and because of their familiarity with the internal operations of the Federal Bureau of Prisons, faculty and students in the Project offer their assistance to this Court.

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[1]The University of Southern California's Project is only one of several law school clinical programs that assist inmates. For many years, the Jerome N. Frank Legal Services Organization at the Yale Law School has represented inmates at the Federal Correctional Institution at Danbury, Connecticut. Similarly, the Kansas Defender Project at the University of Kansas School of Law has long assisted inmates incarcerated at the Federal Penitentiary at Leavenworth, Kansas. The relationship between these legal aid programs and the Bureau of Prisons is discussed in 28 C.F.R. § 543.15 (1994).

[2]Over time, the term for these facilities has changed. Originally called "halfway houses," these facilities have more recently been called "community treatment centers" or "community corrections centers." *See, e.g.*, 18 U.S.C. § 4082(c) (1988) (a "facility," where an inmates may be confined, includes a "community treatment center"); Bureau of Prisons Program Statement 5880.28 (July 29, 1994) [reprinted in part at Pet. App. 46a] (denying sentence credit for time "in residence in a community corrections center"); Bureau of Prisons Program Statement 7310.02 (Oct. 19, 1993) [reprinted in part in the Appendix to this brief at App. 1a] (entitled "Community Corrections Center (CCC) Utilization and Transfer Procedure"). Though the terms are interchangeable, this brief will adopt "community corrections center" because it is the term currently used by the Bureau of Prisons.

## STATEMENT OF THE CASE

On April 23, 1991, respondent Ziya K. Koray was arrested on federal criminal charges brought in the District of Maryland.[3] Petition Appendix ("Pet. App.") 2a. On June 25, 1991, after the entry of his guilty plea but prior to sentencing, the district court ordered Mr. Koray into the custody of the Pretrial Services Agency. *Id.* The court also ordered that Mr. Koray be held at a community corrections center operated by the Volunteers of America in Baltimore. J.A. 9-15. As required by the district court, Mr. Koray was confined at the center for twenty-four hours a day; he could not leave for any reason unless accompanied by an agent. *Id.*; Pet. App. 2a, 25-26a. Mr. Koray remained incarcerated at the center until he reported for the service of his sentence. Pet. App. 2a. Mr. Koray left the community corrections center only once during the entire time he was held there. Pet. App. 19a-20a.

The Bureau of Prisons denied Mr. Koray sentence credit for the time he was confined at the community corrections center. Pet. App. 2a. Mr. Koray subsequently brought a habeas corpus petition to challenge that decision. The district court denied relief, *id.*, but the court of appeals reversed and remanded. The court of appeals found that confinement in a community corrections center is "official detention" within the meaning of 18 U.S.C. § 3585(b) (1988). Pet. App. 14a-24a. The court found it "difficult to view Koray's detention as other than 'official' since he was put in the 'custody' of pretrial services . . ., and was confined to the [community corrections center] by court order." Pet. App. 14a. The Bureau of Prisons now challenges this decision.

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[3]At the time, the Bureau of Prisons did not operate a jail or other institution in that district. *See* Federal Bureau of Prisons, U.S. Department of Justice, Facilities 1991 (describing the Bureau's institutions). Prior to his incarceration at the Volunteers of America facility, Mr. Koray was therefore confined at a county jail in Rockville, Maryland and he received credit for that period. J.A. 25, 27, 29, 31.

## SUMMARY OF ARGUMENT

Section 3585(b) of Title 18 commands the Federal Bureau of Prisons to grant credit for time spent in "official detention" prior to sentencing. According to the Bureau, "official detention" occurs only when a defendant is denied bail under the Bail Reform Act of 1984, 18 U.S.C. sections 3141, *et seq.* (1988 & Supp. V 1993). Brief for the United States ("Pet. Br.") 10. This narrow and formalistic interpretation must fail.

First and foremost, the Bureau's construction of section 3585 is contrary to the statute's plain meaning, conflicts with other statutes and is unreasonable. The ordinary meaning of "detention" includes forced residence in a community corrections center. In her brief, petitioner Reno seeks to counter the plain meaning by arguing that Congress did not conceive of placement in a community corrections center as "imprisonment." Pet. Br. 14. Petitioner claims that "related statutes make clear that a sentence of imprisonment may be served only in a 'penal or correctional facility'" where the prisoner is subject to federal or state control. Pet. Br. 7. If petitioner Reno is implying that a sentence of imprisonment may not be served in a community corrections center, her claim is false. By statute, a community treatment center is a "penal or correctional facility," and federal prisoners regularly serve time in these facilities.

In 1965, Congress authorized the Bureau of Prisons to place inmates in community corrections centers *during* their sentences of imprisonment. In 1984, Congress enacted another law to encourage the Bureau to continue to place sentenced prisoners in these centers. In her brief, the petitioner has overlooked these statutes. Petitioner Reno has also not mentioned the thousands upon thousands of prisoners who are, at this very moment, committed to the Bureau's care for service of a sentence of imprisonment, and who have been sent by the Bureau to community corrections centers to serve their sentences. In May 1993, for example, *8,200 federal inmates* were then serving their

sentences of imprisonment in community corrections centers. In May 1994, *9,000 federal inmates* were in such centers. About half of these centers are privately-run contract facilities, just like that operated by the Volunteers of America. Federal prisoners are held in these community corrections centers under the same conditions as people like Mr. Koray. These prisoners receive sentence credit because both the Congress and the Bureau of Prisons consider confinement in community corrections centers to be part of a term of imprisonment. Thus, the petitioner's construction of the statute — which would grant sentence credit to these prisoners but deny credit to presentence detainees like Mr. Koray — is contrary to the plain meaning of "official detention," is counter to other federal statutes, and is unreasonable. Credit must be given whenever presentence defendants are held in these centers, as held by the court of appeals in *Mills v. Taylor*, 967 F.2d. 1397 (9th Cir. 1992).

Second, this Court must construe section 3585 to avoid serious constitutional problems. Congress did not plainly require this Court to interpret section 3585 in the manner urged by the petitioner. A construction of the statute that grants sentence credit to prisoners in community corrections centers and to anyone detained anywhere by any order of a state court, but denies credit to presentence detainees in community corrections centers, would violate equal protection.

Third, contrary to the petitioner's claims, the Bureau of Prisons can easily administer a rule granting credit for forced residence in a community corrections center. In the overwhelming number of cases, the credit determination will be made from an examination of the presentence report and district court orders. These materials are readily available to the Bureau. Further, given its extensive practice of placing sentenced prisoners in contract community treatment centers, the Bureau has considerable contacts at those centers and a vast amount of information about them.

## ARGUMENT

### I. The Bureau of Prisons' Construction of Section 3585, Which Denies Sentence Credit to Presentence Detainees Who Are Held in Community Corrections Centers Under the Same Conditions As Sentenced Federal Prisoners, Is Contrary to the Plain Meaning of the Statute, Conflicts With Other Laws, and Is Unreasonable.

#### A. Community corrections centers are "penal or correctional facilities," and the Bureau of Prisons regularly places inmates in these centers to serve their sentences of imprisonment.

For thirty years, the Bureau of Prisons has exercised its statutory authority to place inmates in community corrections centers during their sentences of imprisonment. The petitioner is flatly wrong in suggesting that sentences of imprisonment cannot be served in these centers.

The Bureau of Prisons was first given statutory authority to place sentenced prisoners in community corrections centers in 1965. The 1965 law provided that people convicted of federal crimes were to be committed to the custody of the Attorney General for service of their sentences. Act of September 10, 1965, § 1, 79 Stat. 674 (previously codified at 18 U.S.C.A. § 4082(a) (West 1969)). Further, "[t]he Attorney General may designate as a place of confinement any available, suitable and appropriate institution or facility, whether maintained by the Federal government or otherwise . . .." *Id.* (previously codified at 18 U.S.C.A. § 4082(b) (West 1969)). Most significantly, Congress specified that "the term 'facility' shall include a residential treatment center." *Id.* (previously codified at 18 U.S.C.A. § 4082(f) (West 1969)).

The purpose and effect of this law was clear to Congress

and to the Administration. The statute was enacted at the request of the Attorney General, Nicholas DeB. Katzenbach. In his letter to the Senate, Katzenback wrote that "[t]his proposed legislation would expressly authorize the Attorney General to commit or transfer prisoners to residential community treatment centers." S. Rep. No. 613, 89th Cong., 1st Sess. (1965) (letter from Nicholas DeB. Katzenbach to the Vice-President (Mar. 29, 1965)), *reprinted in* 1965 U.S. Code Cong. & Admin. News 3076, 3081. The "Purpose" section of the Senate Report states that the bill's basic provisions, "authorizing the use of residential community treatment centers . . ., would get prisoners started in law-abiding careers *before* they are released from their terms of imprisonment." *Id.* at 3076 (emphasis added).

Congress subsequently passed the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976, which revised the federal criminal code. Under the Act, a person who is sentenced to a term of imprisonment "shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed." *Id.*, § 212(a)(2), 98 Stat. 2007 (codified at 18 U.S.C. § 3621(a) (1988)). The Bureau "may designate any available penal or correctional facility" for service of that sentence, "whether maintained by the Federal Government or otherwise." *Id.* (codified, as amended, at 18 U.S.C. § 3621(b) (1988 & Supp. V 1993)). In the Act, Congress retained the provision that "facility" includes a "residential community treatment [corrections] center." *Id.*, § 218(a)(3), 98 Stat. 2027 (codified at 18 U.S.C. § 4082(c) (1988)).

These provisions demonstrate that, in passing the Comprehensive Crime Control Act (which also contained section 3585(b)),[4] Congress continued to consider placement in a community corrections center to be an ordinary part of a sentence

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[4]Section 3585 was also passed as part of the Act. *Id.*, § 212(a)(2), 98 Stat. 2001.

of imprisonment. But Congress did more than merely reorganize the prior statute. In the Act, Congress added a completely new provision: "[t]he Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part . . . under conditions that will afford the prisoner a reasonable opportunity . . . to prepare for his re-entry into the community." *Id.*, § 212(a)(2), 98 Stat. 2009 (codified, as amended, at 18 U.S.C. § 3624(c) (1988 & Supp. V 1993)). The Act thus demonstrates not only Congress' awareness that inmates would serve sentences in community corrections centers, but that Congress *encouraged* such placements. There can be no other reasonable interpretation of sections 3621(b) and 3624(c).

The Bureau of Prisons' own Program Statements and practices irrefutably confirm this interpretation. Program Statement 7310.02 is reprinted in part in the Appendix ("App.") to this brief. It gives the Bureau's "operational philosophy" for placement of inmates in a community corrections center ("CCC"): "whenever possible, eligible inmates are to be released to the community through a CCC." Program Statement 7310.02 (Oct. 19, 1993), *infra*, at App. 1a. As the Bureau explains,

> CCCs provide an excellent transitional environment for inmates *nearing the end of their sentences*. The level of structure and supervision assures accountability and program opportunities in employment counseling and placement, substance abuse, and daily life skills.

*Id.* (emphasis added).[5] The same Program Statement reprints

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[5]Another portion of the same Program Statement states:

> CCCs, commonly referred to as "halfway houses," provide suitable residence, structured programs, job placement, and counseling, while the inmates' activities are closely monitored.

(continued...)

section 3621(b), which gives the Bureau the ability to designate "any available penal or correctional facility" for service of a sentence of imprisonment. *Id.*, *infra*, at App. 2a. After quoting the statute, the Program Statement explains that "[a] CCC meets the definition of a 'penal or correctional facility.'" *Id.*

Pursuant to the authorizing statute and the Bureau's Program Statement, tens of thousands of federal inmates serve portions of their sentences in community corrections centers every year. On May 12, 1993, the Director of the Federal Bureau of Prisons, Kathleen M. Hawk, testifed before Congress about federal prison population trends. She told Congress that there were then over 76,000 inmates in federal prison facilities and another 8,200 in contract facilities. Federal Prison Population; Present and Future Trends: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the Comm. on the Judiciary, House of Representatives, 103d Cong., 1st Sess. 7 (1993) (testimony of Kathleen M. Hawk). In response to questioning by members of Congress, Director Hawk described the Bureau's extensive use of private contract facilities, such as the Volunteers of America community corrections center:

> MR. COBLE. Now most of these [8,200] contract inmates, I presume, are housed in

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[5](...continued)
*Id.*, *infra*, at App. 3a. As reported by the Federal Judicial Center, "[t]he Bureau of Prisons maintains a network of contractor-operated halfway houses — community treatment centers (CTCs) — principally for offenders who are approaching the ends of their terms of imprisonment." James B. Eaglin, Federal Judicial Center, Sentencing Federal Offenders for Crimes Committed Before November 1, 1987, at 7 (1991 ed.). The same publication notes that while section 3624(c) applies "specifically to persons who committed offenses after November 1, 1987, the Bureau utilizes its existing CTCs and various prerelease programs to achieve [the same] goal" for all inmates. *Id.* at 8.

> facilities operated by municipalities and/or counties. Would that be a valid conclusion?
>
> MS. HAWK. Roughly half are community corrections facilities that are not operated by municipalities at all. Most of that half are either private or nonprofit. The other half are run through intergovernmental agreements with municipalities, although they then contract out much of the services to private vendors.

*Id.* at 48. Director Hawk also testified that the average length of time that a federal inmate spends in a community corrections center prior to his or her release is 123 days. *Id.* With these figures, one may estimate that each year tens of thousands of federal prisoners serve portions of their terms of imprisonment in community corrections centers, prior to their release. And the numbers are, if anything, increasing. In May 1994, Director Hawk told Congress that the total population of Bureau facilities was then 84,000 inmates, but "[w]e have another 9,000 that are in contract facilities or halfway houses." Prison Inmate Training and Rehabilitation Act of 1993: Hearings Before the Subcomm. on Intellectual Property and Judicial Administration of the Comm. on the Judiciary, House of Representatives, 103d Cong., 2d Sess. 52 (1994) (testimony of Kathleen M. Hawk).

In sum, the petitioner is simply incorrect in suggesting that confinement in a community corrections center may never be imprisonment.[6] Congress has determined that a community

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[6]The government has argued, in other contexts, that a sentence of "imprisonment" includes both prison time and "community confinement." In *United States v. Strozier*, 940 F.2d 985, 988 (6th Cir. 1991), the court accepted the government's argument that a sentence of seven months in prison and seven months of community confinement, amounted to a total sentence of more than one year of imprisonment. With a sentence of

(continued...)

corrections center is a "penal or correctional facility." Every year, the Bureau holds thousands upon thousands of prisoners in community corrections centers, just like the center where Mr. Koray was confined. All of these prisoners earn credit towards their sentences of imprisonment, pursuant to Congress' command.

### B. The Bureau of Prisons' interpretation of section 3585 conflicts with the statute's plain meaning and other laws, and is unreasonable.

"Official detention" is not defined in the statute. Nor is the term expressly linked to "orders of detention" under the Bail Reform Act of 1984; section 3585 does not cite to the detention provisions of that Act. The heading of section 3585(b) is "Credit for prior *Custody*." (Emphasis added). The predecessor statute to 3585(b), former 18 U.S.C. § 3568, gave sentence credit for days spent "*in custody* in connection with the offense." This Court has rightfully noted that the title of a section can aid in determining the meaning of its text. *See INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189 (1991); *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989). Given that the language of the prior statute is repeated in the heading of the new statute, given the lack of a specific reference in section 3585(b) to the Bail Reform Act, and given Congress' understanding that time in a community corrections center forms part of a sentence of imprisonment, Congress could not have intended that "official detention" means only time in custody of prison officials pursuant to a federal order of detention. Indeed, when section 3585(b) was enacted, the Bureau of Prisons did not take "official detention" to mean only detention under the Bail Reform Act. In 1989, the General Counsel of the Bureau issued an "Operations Memorandum" that simply defined "official detention" as "custody." *See* Bureau of

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[6](...continued)
imprisonment of more than one year, the district court was required to impose a term of supervised release. *Id.*

Prisons Operations Memorandum from General Counsel Clair A. Cripe (October 23, 1989), *reprinted infra*, at App. 9a ("Under section 3585(b), an inmate will receive jail credit on the federal sentence, for time spent in pre-sentence custody in connection with the federal offense.").[7] The Operations Memorandum did not link "official detention" with detention under the Bail Reform Act.

When a term is not defined in a statute, it is given its ordinary or natural meaning. *Asgrow Seed Co. v. Winterboer*, 115 S.Ct. 788, 793 (1995); *United States v. Alvarez-Sanchez*, 114 S.Ct. 1599, 1603 (1994); *Russello v. United States*, 464 U.S. 16, 21 (1983). "Detention" is defined as "a holding in custody," or "a period of temporary custody prior to disposition by a court." Webster's Third New International Dictionary 616 (1986). It may also be termed a "[k]eeping in custody or confinement; arrest." IV Oxford English Dictionary 545 (2d ed. 1989). The ordinary meaning of "detention" must include forced residence in a community corrections center.[8] Confinement in a community corrections center must also be deemed "official" when it is required by a federal court. Pursuant to section 3621(a), the district courts commit defendants to the custody of the Bureau of

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[7]The Operations Memorandum was filed by the United States as part of the record in *Mills v. Taylor*, C.A. No. 91-55362 (9th Cir. 1992).

[8]*See Moreland v. United States*, 968 F.2d 655, 664 (8th Cir.) (en banc) (Heaney, J., dissenting) (finding that that the ordinary meaning of "official detention" includes custody at a community corrections center), *cert. denied*, 113 S.Ct. 675 (1992); *Mills v. Taylor*, 967 F.2d 1397, 1401 (9th Cir. 1992) (quoting *Brown v. Rison*, 895 F.2d 533 (9th Cir. 1990) and finding that confinement in a community corrections center falls within the plain meaning and obvious intent of "official detention"); *Ramsey v. Brennan*, 878 F.2d 995, 996 (7th Cir. 1989) (noting that "[t]o a normal English speaker, even to a legal English speaker, being forced to live in a halfway house is to be held 'in custody'").

Prisons for service of their sentences of imprisonment. Surely the Bureau considers these commitment orders "official." Orders that send defendants to community corrections centers are not made "unofficial" because of the destination of the defendants. Thus, the Bureau's definition of "official detention" conflicts with the plain meaning of the term.

Moreover, even if the term "official detention" is not given its ordinary meaning, but is interpreted solely by reference to other statutes, as the petitioner urges, it includes forced residence in a community corrections center. The petitioner argues that the term ought to be construed by reference to sections 3585(a) and 3621(b), and hence "credit for time 'spent in official detention' under Section 3585(b) is available only to a defendant who [is] detained in a 'penal or correctional facility,' 18 U.S.C. 3621(b), and [is] subject to the control of state or federal penal authorities." Pet. Br. 13; *see also* Pet. App. 45a-46a. But, as we have seen, Congress has specifically included a community corrections center within the definition of a "penal or correctional facility." And the petitioner's requirement that the facility be subject to the control of "state or federal penal authorities" appears nowhere in the statutes. Section 3621(b) says that the facility may be "maintained by the federal Government *or otherwise*." 18 U.S.C. § 3621(b) (1988 & Supp. V 1993) (emphasis added). As the above discussion has demonstrated, both Congress and the Bureau of Prisons agree that sentences of imprisonment may be served in private contract facilities, which are not maintained by federal or state penal authorities. Hence, a study of the surrounding statutes shows that "official detention" includes time in custody in a contract community corrections center.

The Bureau's current interpretation of section 3585 also contradicts any direct linkage to detention orders issued by the federal courts pursuant to the Bail Reform Act. For example, as the petitioner concedes, the Bureau grants credit when a defendant is in the custody of state officials prior to being brought to federal court. *See* Pet. Br. 11. Such a defendant has not been detained

pursuant to a federal detention order. The Bureau also grants credit for the period following a federal defendant's arrest and prior to the entry of an order governing detention or release. *See, e.g.*, Bureau of Prisons Program Statement 5880.28 (Sentence Computation Manual) (Feb. 21, 1992 & July 29, 1994), at 1-17 to 1-19, 1-24A (giving examples of sentence computation; all the examples begin federal detention credit at the time of arrest, and not at the date of entry of a court order of detention). The Bureau considers such a defendant to be in "official detention" even though he or she has not yet been to court and no detention order has yet issued.

The term "official detention" is not defined in section 3585(b) and the ordinary meaning of the term unambiguously includes forced residence at a community corrections center. Nevertheless, if this Court considers the term to be ambiguous, the petitioner's construction ought to be rejected because it is unreasonable. A court construing an ambiguous statute may consider the "[j]udicial perception that a particular result would be unreasonable." *Commissioner v. Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987) (per curiam); *see also United States v. Turkette*, 452 U.S. 576, 580 (1981) (absurd results are to be avoided). Under the Bureau's construction of section 3585(b), people held in state custody, under an unknown set of conditions, receive credit. And, as already explained, federal inmates receive sentence credit when they are sent by the Bureau to these very same centers. Perhaps most remarkably, the Bureau has even reserved to itself the power to place pretrial detainees in community corrections centers, *and to grant them sentence credit*. In Program Statement 5880.28, Pet. App. 46a, the Bureau considers a person to be in "official detention" when a court has entered an order of detention *and the Bureau places that person in a center*. There is no valid reason for this disparate treatment.

The only justification given by the Bureau for denial of credit is that people put in community corrections centers by the Bureau may be removed at the discretion of the Attorney General

and they may be prosecuted for escape if they leave the centers. *See* Program Statement 5880.28, Pet. App. 46a. This is not a sufficient reason to justify the denial of credit. As Judge Heaney wrote for the five dissenters in *United States v. Moreland*, "I do not see how a delineation of the paths by which people become residents or a recitation of official goals and reasons leading to their residential status can adequately serve as a rational basis for differing treatment." *United States v. Moreland*, 968 F.2d 655, 666 (8th Cir.) (en banc) (Heaney, J., dissenting), *cert. denied*, 113 S.Ct. 675 (1992).[9]

Presentence defendants who are confined in these centers pursuant to a court order may be removed from the centers at the court's discretion. The court "may at any time amend the order to impose additional or different conditions of release." 18 U.S.C. § 3142(c)(3) (1988 & Supp. V 1993). Further, a person who violates a condition of a release order "is subject to a revocation of release, an order of detention, and a prosecution for contempt of court." 18 U.S.C. § 3148(a) (1988); *see also* 18 U.S.C. § 3148(c) (1988) ("The judicial officer may commence a prosecution for contempt, under section 401 of this title, if the person has violated a condition of release"). Such a prosecution would be for criminal and not civil contempt, because it would be punishment for the past violation, as opposed to an attempt to force future compliance with a court order. *See United States v. Dixon*, 113 S.Ct. 2849, 2855-2856 (1993) (Double Jeopardy Clause attaches when defendants are convicted of criminal contempt for violation of pretrial release orders under District of Columbia statutes); *Local 28 of the Sheet Metal Workers' Int'l Assoc. v. EEOC*, 478 U.S. 421, 443 (1986) (criminal contempt sanctions are punitive and are imposed to vindicate the court's authority). Criminal contempt "is a crime in every fundamental

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[9]*See also Johnson v. Smith*, 696 F.2d 1334, 1337-1340 (11th Cir. 1983) (finding that the denial of credit violated equal protection under former 18 U.S.C. § 3568, the predecessor statute, where the government offered no reason to support the difference in treatment).

respect." *Bloom v. Illinois*, 391 U.S. 194, 201 (1968). Moreover, in addition to the public approbation visited on all those who violate our criminal laws, the federal contempt statute authorizes the imposition of a "lasting" imprisonment. *See* 18 U.S.C. § 401 (1988) (federal court may punish contempt "by fine or imprisonment"); *United States v. Barnett*, 376 U.S. 681, 694 (1963) (reviewing criminal contempt authority, and noting that the cases permit the imposition of even "'an oppressive fine, or lasting imprisonment'"; citation omitted).[10]

Nor may the Bureau's reading of section 3585(b) be justified by the conditions under which presentence defendants are confined in community corrections centers. The petitioner has expressly abandoned any sort of functional analysis of detention. *See* Pet. Br. 23. Moreover, the petitioner would lose under any such functional analysis. The conditions under which presentence defendants are held in community corrections centers are at least as restrictive as those applied to sentenced inmates in the same facilities. For example, Mr. Koray was held in the community corrections center for twenty-four hours each day. By comparison, the stay of sentenced prisoners ordinarily consists of several stages. When sentenced prisoners are initially designated to community corrections centers, they are generally restricted to the centers except for employment or structured activities. *See* Program Statement 7310.02, *infra*, at App. 3a. That period normally lasts two weeks. After that, inmates are granted greater access to the community through weekend and evening passes. *Id., infra,* at App. 3a-4a. Finally, inmates may be permitted to live at home "while continuing in official detention status." *Id., infra,* at App. 4a. Mr. Koray's confinement was at least as restrictive as the first stage of inmates' imprisonment at community corrections centers, and it was much more restrictive than the second and third stages

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[10]It is also worth noting that a person who is in the "official detention" of state authorities is subject neither to the Attorney General's discretion nor to a federal prosecution for escape. Yet that person may receive credit against a federal sentence.

of those imprisonments.

The petitioner's interpretation of section 3585(b) thus conflicts with the plain meaning of the statute, with other statutes, and is unreasonable. It should not be sustained by this Court.

### C. There is no reason to defer to the Bureau of Prisons' interpretation of section 3585.

The petitioner argues that this Court should defer to the Bureau of Prisons' construction of section 3585, as the Bureau is the agency charged with admininstering the statute. Pet. Br. 21-28. The Bureau of Prisons does have the duty to administer section 3585 and to compute sentence credit for time spent in "official detention." *United States v. Wilson*, 112 S.Ct. 1351, 1354-55 (1992). Nevertheless, the petitioner's argument should be rejected. No deference is owed on pure questions of statutory construction. Further, this Court ought not defer to the Bureau's inexpert, unpublished and unreasonable construction of section 3585.

There is no deference to an agency on pure questions of statutory construction. Such questions are for the courts to decide. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Whether Congress intended the term "official detention" to be an express reference to the Bail Reform Act is a pure question of statutory construction. In assessing whether section 3585(b) contains an express reference to another statute, the Bureau is not acting to fill in a gap left by Congress. The Bureau has not promulgated any sort of legislative rule to decide what ought to constitute "official detention." In Program Statement 5880.28, Pet. App. 45a-46a, the Bureau has merely asserted its belief that "official detention" refers to detention under the Bail Reform Act. In this respect, this case is just like *Cardoza-Fonseca*. There this Court held that the question whether two statutory standards were identical was a pure question of statutory construction, and no deference was owed to the agency's interpretation. *Id.* at 448. *See also Federal Election*

*Comm'n v. NRA Political Victory Fund*, 115 S.Ct. 537, 543 (1994) ("we do not think that the [statutes], authorizing the FEC to litigate in federal courts, are the sort of provisions which can be said to be within the province of the agency to interpret."). Because the Bureau is in no better position than this Court to resolve a pure question of statutory construction, no deference is owed. The statute ought to be given its ordinary meaning, which includes forced residence in a community corrections center.

If this Court determines, however, that the issue is not a pure question of statutory construction, there is still no reason to defer to the agency. There is no deference to an administrative construction if the intent of Congress is clear. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Given that Congress has defined a community corrections center to be a "penal or correctional facility," and given the ordinary meaning of the term "official detention," there is no ambiguity here. Congress clearly intended "official detention" to include forced residence in a community corrections center. There is no deference where, as here, an agency's construction is contrary to the plain language of a statute, *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991), or where it "goes beyond the meaning that the statute can bear." *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*, 114 S.Ct. 2223, 2231 (1994).

Nor is this the sort of instance where policy favors deference to the executive. In *Chevron*, this Court detailed some of the reasons why deference may be appropriate. The regulatory scheme may be "technical and complex," the agency may have considered the manner "in a detailed and reasoned fashion," and the agency's decision may involve "reconciling conflicting policies." *Id.* at 865 (footnotes omitted). None of these reasons are advanced by deference here.

First, the regulatory scheme is neither technical nor complex. What constitutes "official detention" is primarily a legal

and not a technical question. And in applying the legal definition to individual cases, the Bureau will review the *court orders* that confine people in community corrections centers. Surely the federal courts need not defer to an agency's application of a statute to a *court order*. The Bureau cannot possibly claim that it is better able than a court to assess the meaning of a court order.

Second, the Bureau has not considered section 3585(b) in a "detailed and reasoned fashion." The Bureau's Policy Statement is not published. It was not promulgated pursuant to the Administrative Procedures Act, 5 U.S.C. sections 551, *et seq.* (1988 & Supp. V 1993). Courts give unpublished and informal interpretations only *some* weight. *See Martin v. OSHRC*, 499 U.S. 144, 157 (1991). Moreover, the Bureau has changed its construction of the statute. When section 3585(b) was first promulgated, the Bureau simply equated "official detention" with "custody." *See* Operations Memorandum, *infra*, at App. 9a. Only recently has the Bureau, in Program Statement 5880.28, decided that "official detention" was meant by Congress to be an express reference to orders of detention under the Bail Reform Act. The Bureau's new construction of the statute was promulgated after the Bureau denied Mr. Koray sentence credit. While the Bureau is not estopped from changing its construction of the statute, a changed construction is entitled to much less deference than a consistently-held view. *Good Samaritan Hospital v. Shalala*, 113 S.Ct. 2151, 2161 (1993) (citations omitted); *Estate of Cowart v. Nicklos Drilling Co.*, 112 S.Ct. 2589, 2596 (1992). And the amount of deference due to an agency construction that has been promulgated during litigation presents a difficult and perhaps unresolved question for this Court. *See Estate of Cowart*, 112 S.Ct. at 2594-2595.

Third, the Bureau has not arrived at its construction after reconciling "conflicting policies." According to the petitioner, "the Bureau has now abandoned a 'functional approach' to the custody issue." Pet. Br. 23. Had the Bureau taken a discerning "functional approach," it might be said that the Program Statement

reconciled various policies about sentence credit. Instead, the Program Statement merely attempts to link "official detention" to the Bail Reform Act. All the Bureau has done is place its own spin on the language of the statute.

Finally, as already demonstrated, the Bureau's interpretation of section 3585(b) is unreasonable. No deference is owed to an unreasonable agency construction of a statute. *See Chevron U.S.A. Inc.*, 467 U.S. at 844-845; *see also Estate of Cowart*, 112 S.Ct. at 2594 (deference may be owed to "a reasonable statutory interpretation").

The petitioner's interpretation of section 3585(b) presents a pure question of statutory construction, appropriate for this Court to determine. Neither precedent nor policy require deference to the Bureau's construction of the statute.

## II. This Court Should Interpret Section 3585 to Require Sentence Credit for Presentence Detainees Who Are Held in Community Corrections Centers Under the Same Conditions As Sentenced Federal Prisoners; Any Other Construction Would Raise Serious Constitutional Questions.

The petitioner's construction of section 3585 would violate equal protection. This Court should construe section 3585 to avoid raising serious constitutional questions. Interpreting the statute to grant credit for forced residence in a community corrections center would avoid any constitutional difficulties.

Whenever possible, this Court should construe a statute to avoid conflicts with the Constitution. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop Of Chicago*, 440 U.S. 490, 500 (1979); *Johnson v. Robison*, 415 U.S. 361, 366-367 (1974). Congress is sworn to uphold the Constitution. This Court "will therefore not lightly assume that Congress

intended to infringe constitutionally protected liberties . . .." *Edward J. DeBartolo Corp., supra.* A statute will be construed to avoid serious constitutional problems unless that construction "is plainly contrary to the intent of Congress." *Id.*; *see also Public Citizen v. United States Department of Justice*, 491 U.S. 440, 466 (1989) ("we are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils"); *Catholic Bishop Of Chicago*, 440 U.S. at 500-01 (intent of Congress must be clearly expressed).

The Due Process Clause of the Fifth Amendment essentially incorporates the provisions of the Equal Protection Clause of the Fourteenth Amendment. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The government violates a person's right to equal protection when similarly situated parties are treated dissimilarly, absent sufficient justification. *See generally City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-442 (1985). At a minimum, the petitioner must show that the disparate treatment of presentence detainees in community corrections centers is rationally related to a legitimate governmental interest. *Id.* at 441-442. This standard is not toothless. The government "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* at 446.

Presentence detainees in community corrections centers are similarly situated to at least two other groups: (a) sentenced federal prisoners who reside in the same centers under the same conditions; and (b) presentence defendants who are in the custody of state authorities, under whatever conditions are imposed by the state.

With respect to the first group, as already demonstrated, presentence detainees in community corrections centers are generally subject to restrictions that are at least as severe as those

imposed on federal prisoners who are held there. In addition, both are placed in the centers for reasons of public safety. Defendants may be ordered to reside in community corrections centers if such conditions would "reasonably assure . . . the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B) (1988 & Supp. V 1993). Similarly, courts that sentence defendants are required to consider the need "to protect the public from further crimes." 18 U.S.C. § 3553(a)(2)(C) (1988). And, as discussed in part IB, above, presentence detainees and sentenced prisoners are both subject to new criminal sanctions if they violate the terms of an order placing them in a center or escape.

With respect to the second group, the Bureau of Prisons grants sentence credit for defendants who are in "official detention" of state officials, if the detention is in connection with the federal offense and the defendants do not receive credit against a state sentence. *See* Pet. Br. 11. Like presentence detainees in community corrections centers, defendants held in state facilities may be subjected to a variety of restrictions, some less severe and some more severe.

There is no rational reason for the difference in treatment. The same points that demonstrate that the petitioner's construction is unreasonable apply here. The Bureau's award of sentence credit to sentenced prisoners in community corrections centers shows that its interpretation of section 3585 is arbitrary and irrational. The fact that those sentenced prisoners can be prosecuted by the federal government for escape is not a rational reason for the disparate treatment. Presentence detainees who leave community corrections centers may be subjected to "lasting" imprisonment for criminal contempt. Further, presentence defendants who are detained by the state may not be prosecuted by the federal government for escape or contempt. Yet they receive sentence credit. At its heart, the only real reason the Bureau has advanced for the disparate treatment is that a court rather than the Bureau has placed the presentence detainees in community corrections centers. That cannot be a sufficient justification for the difference in sentence

credit.

This Court need not strike down section 3585 as unconstitutional. The plain language of the statute does not compel the petitioner's construction. This Court should construe the statute so that it does not violate the Constitution. Sentence credit must be provided for defendants who are ordered to reside in community corrections centers prior to trial.

## III. The Bureau of Prisons Would Have No Difficulty Administering a Rule That Affords Sentence Credit for Forced Residence In Community Corrections Centers Prior to Sentencing.

*Amicus curiae* submits that this Court should determine that forced residence in a community corrections center is "official detention," as held by the court of appeals in *Mills v. Taylor*, 967 F.2d. 1397 (9th Cir. 1992). If this Court so holds, the Bureau will have no difficulty administering the rule. First, the sentence credit will usually be based on the presentence investigation report prepared by the probation officer and forwarded to the Bureau of Prisons. Second, the Bureau is already familiar with conditions in community corrections centers. Third, The Bureau has already proven that it can administer this rule.

### A. All of the information needed by the Bureau of Prisons to award sentence credit is contained in presentence investigation reports or in court files.

Under 18 U.S.C. § 3552(a) (1988), probation officers are directed to perform presentence investigations of all defendants and to report the results to the court. Federal Rule of Criminal Procedure 32 directs that a presentence investigation report be prepared in each case, unless the court makes a finding that a report is not necessary. Fed. R. Crim. P. 32(c)(1). The rule also contemplates that a copy of the presentence investigation report

will be forwarded to the Bureau of Prisons. Fed. R. Crim. P. 32(c)(3)(D). The presentence investigation report thus not only aids the court in determining the appropriate sentence, but it also assists the Bureau of Prisons in classifying and programming inmates, and in preparing them for release. *See* Administrative Office of the United States Courts, Division of Probation, The Presentence Investigation Report (Publication 105) 1 (1984).

A presentence investigation report is comprehensive. The probation officer is responsible for searching out all relevant facts about the defendant and presenting them in an organized, objective report. *Id.* at 3. Every report contains a face sheet, which provides an overview of significant information. *Id.* at 7. The face sheet generally includes information about the defendant's custodial status. *Id.* Moreover, under the most recent presentence manual published by the Administrative Office of the United States Courts, the probation officer is required to describe the defendant's adjustment in pretrial custody or while under pretrial supervision. *See* Administrative Office of the United States Courts, Probation and Pretrial Services Division, The Presentence Investigation Report for Defendants Sentenced Under the Sentencing Reform Act of 1984 (Publication 107) II-8, II-34 (rev. Mar. 1992). Hence, for a defendant such as Mr. Koray, who was placed in the custody of the Pretrial Services Agency, the presentence investigation report should contain details of his supervision and confinement, including his forced residence at the community corrections center. In fact, it is easier for the Bureau to learn about conditions of residence at a community corrections center than about conditions of detention in a state facility. Because a defendant held in a center will ordinarily be under the supervision of the Pretrial Services Agency, a federal agency, full information should be in the presentence report. When a person is held in state custody, the Bureau must research the conditions of confinement on its own.

If, for some reason, the Bureau finds a presentence investigation report lacking, the necessary information should be easy to gather. Information about conditions of confinement would

ordinarily appear in the district court's order placing a person in a community corrections center. Contrary to the petitioner's claim that the Bureau would be forced to base credit decisions on unverifiable information, Pet. Br. 15, the court file should provide the answers to the Bureau's questions. The petitioner has conceded that a defendant's "bail form" ordinarily accompanies an inmate after he or she is sentenced. Pet. Br. 28. The "bail form" in this case would have answered all of the Bureau's questions. It provided that Mr. Koray was to be confined for twenty-four hours a day at the community corrections center.

### B. The Bureau of Prisons has an extensive network to oversee contract community corrections centers.

As discussed earlier, every year tens of thousands of federal inmates serve a portion of their sentences in community correction centers, and this number is increasing. These facilities are so regularly utilized that the Bureau of Prisons has established a Community Corrections Branch to implement its community custody program. *See* Federal Bureau of Prisons, U.S. Department of Justice, Facilities 1991, at 82. In 1991, the year that Mr. Koray was sentenced, the Bureau of Prisons maintained thirty-three Community Corrections Offices nationwide, including one in Baltimore. *Id.* at 82-83. Each Community Corrections Office is staffed with a manager who is "responsible for development, administration, and routine oversight of residential and nonresidential services provided through contractual agreements." *Id.* at 82.

The petitioner portrays community corrections centers, such as the Volunteers of America, as purely private entities. According to the petitioner, their records are not available to the Bureau as a matter of right and their information is less verifiable than information from law enforcement agencies. Pet. Br. at 15. With respect, this characterization is not accurate. Facilities such as the Volunteers of America are on contract with the Bureau of

Prisons. The Bureau oversees the services that they provide. Not only must the Bureau of Prisons have at hand full information about each of these contract facilities, but due to the nature of their relationship, the Bureau must surely be in a position to gain any needed information from them.

### C. The Bureau of Prisons' ease in administering the Ninth Circuit's rule demonstrates that it has no difficulty granting credit for forced residence in community corrections centers.

The Ninth Circuit held in *Brown v. Rison*, 895 F.2d. 533 (9th Cir. 1990), that forced residence in a community corrections center is time "in custody" within the meaning of former 18 U.S.C. § 3568. In *Mills v. Taylor*, 967 F.2d. 1397 (9th Cir. 1992), the court of appeals reached the same conclusion under § 3585(b), the successor statute to § 3568. Following these decisions, the Bureau drafted a bright-line rule:

> credit for time spent in a community treatment center as a condition of bond (including appeal bond) is considered the same as time spent in "official detention" for those sentenced in the Ninth Circuit, if they were required to spend nights in the community corrections center.

Program Statement 5880.28, Pet. App. 47a. *Amicus curiae* submits that this is an appropriate rule for implementation nationwide.

This rule comports with the plain meaning of section 3585(b), because it would award sentence credit for time spent in custody of a community corrections center. It would not raise constitutional concerns because it would afford sentence credit under the same circumstances that credit is given to sentenced federal inmates who are placed in community corrections centers.

Sentenced inmates are given credit for a day in custody even if they are permitted to leave the centers to go to work. *See* Bureau of Prisons Program Statement 5880.28 (Sentence Computation Manual) (July 29, 1994), at 1-12 ("The Bureau of Prisons calculates any part of a day in custody serving sentence as a *full day* served on the sentence . . . and any part of a day in official detention as a *full day* for prior custody time purposes"; emphases in original).

There has been no indication of any difficulty in administering this rule. The Bureau's success in implementing this rule demonstrates that the rule could easily be administered if given nationwide application.

## CONCLUSION

For the reasons set forth in this brief, *amicus curiae* respectfully asks this Court to remand this case for the award of sentence credit for the period during which Mr. Koray was confined at the community corrections center.

Respectfully submitted,

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## APPENDIX

A. Excerpts from Federal Bureau of Prisons Program Statement 7310.02 (October 19, 1993): "Community Corrections Center (CCC) Utilization and Transfer Procedure"

B. Federal Bureau of Prisons Operations Memorandum (October 23, 1989): "Credit for Time In Custody Under 18 U.S.C. 3585(b)"

**U.S. Department of Justice**
Federal Bureau of Prisons

# Program Statement

**OPI**: CPD
**NUMBER:** 7310.02

**DATE:** October 19, 1993
**SUBJECT:** Community Corrections Center (CCC) Utilization and Transfer Procedure

1. PURPOSE AND SCOPE. To provide guidelines to staff regarding the effective use of Community Corrections Centers (CCCs). This Program Statement defines placement criteria, requires that staff members start the placement process in a timely manner, and defines the circumstances when inmates may refuse community corrections (CC) programs. It also establishes an operational philosophy for CCC referrals that, whenever possible, eligible inmates are to be released to the community through a CCC, unless there is some impediment as outlined herein.

CCCs provide an excellent transitional environment for inmates nearing the end of their sentences. The level of structure and supervision assures accountability and program opportunities in employment counseling and placement, substance abuse, and daily life skills.

One reason for referring an inmate to a CCC is to increase public protection by aiding the transition of the offender into the community. Participating in community-based transitional services reduces the likelihood of an inmate with limited resources recidivating than might be the case if the inmate makes an abrupt transition from the institution to the community. While clearly dangerous inmates should be separated from the community until completion of their sentences, other eligible inmates should generally be referred to CCCs to maximize the chances that they will successfully reintegrate into society.

* * * *

4. STATUTORY AUTHORITY. 18 U.S.C., Section 3624(c), provides:

> "The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last ten per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his reentry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The U.S. Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody."

18 U.S.C. Section 3621(b) provides:

> "The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility . . . the Bureau determines to be appropriate and suitable." A CCC meets the definition of a "penal or correctional facility."

Therefore, the Bureau is not restricted by Section 3624(c) in

designating a CCC for an inmate and may place an inmate in a CCC for more than the "last ten per centum of the term," or more than six months, if appropriate.

Section 3624(c), however, does restrict the Bureau in placing inmates on home confinement to the last six months or 10 percent of the sentence, whichever is less.

## 5. COMMUNITY-BASED PROGRAMS

a. Community Corrections Centers (CCC). CCCs, commonly referred to as "halfway houses," provide suitable residence, structured programs, job placement, and counseling, while the inmates' activities are closely monitored. All CCCs offer drug testing and counseling for alcohol and drug-related problems. During their stay, employed inmates are required to pay a subsistence charge to help defray the cost of their confinement; this charge is 25 percent of their gross salary, not to exceed the average daily cost of their CCC placement. Failure to make subsistence payments may result in disciplinary action.

These contract facilities, located throughout the United States, provide three program components: Community Corrections, Prerelease, and Home Confinement:

(1) The Community Corrections Component is designed as the most restrictive option. Except for employment and other structured program activities, an inmate in this component is restricted to the CCC. An inmate will ordinarily be placed in the Community Corrections Component upon arrival at the CCC. This orientation period normally lasts for two weeks or until the inmate has demonstrated to CCC staff the responsibility necessary to function in the community. Based on their professional judgment, CCC staff will determine when an inmate is prepared to advance to the prerelease component.

(2) The Prerelease Component is designed to assist inmates making the transition from an institution setting to the community. These inmates have more access to the community and family members through weekend and evening passes.

(3) The Home Confinement Component is restricted to inmates who ordinarily are serving the last 10 percent of their sentences not exceeding six months. This is a selective status that is authorized discriminately according to an inmate's adjustment and needs. Inmates are permitted to reside at home and be gainfully employed while continuing in official detention status. Sub-section b.(4) below provides more detail about this program.

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6. RELEASE PLAN. Staff shall begin release planning at an inmate's first team meeting, normally the initial classification, and shall continue throughout the inmate's confinement. The following guidelines apply:

a. Planning early in an inmate's period of confinement is necessary to ensure prerelease needs are identified and appropriate prerelease programs are recommended.

b. Preliminary decisions regarding eligibility for CC programs is to be made well in advance of the last year of confinement.

c. A final and specific prerelease plan, including a decision as to CCC referral, is normally established at a team meeting no later than 11 to 13 months before an inmate's projected release date.

7. CCC CRITERIA AND REFERRAL GUIDELINES. Staff shall make recommendations for CCC placements based on assessments of inmate needs for services, public safety, and the necessity of the BOP to manage its inmate population responsibly. CCCs are a program element and are not to be used as a reward for good institutional behavior, although an inmate's institutional

adjustment may be a factor in making a referral determination.

A number of factors must be weighed to determine the length of CCC placement for inmates, including their individual needs and existing community resources. Institution staff make a recommendation for a specific placement date to the CCM office, and Community Corrections staff determine placement dates and closely monitor average lengths of stay to efficiently manage the bedspace usage. Budgetary constraints also are a key consideration and may affect average lengths of stay. CC staff shall make every effort to establish an acceptable date as close to the institution's recommended date as possible. In any event, the acceptance date shall not precede the recommended date.

The following CCC referral guidelines apply:

a. An inmate may be referred up to 180 days, with placement beyond 180 days highly unusual, and only possible with extraordinary justification. In such circumstances, the Warden shall contact the Regional Director for approval and the Chief U.S. Probation Officer in the inmate's sentencing district to determine whether the sentencing judge objects to such placement.

b. The ultimate goal is to maximize each eligible inmate's chances for successful release and a law-abiding life.

c. When an inmate has a history of escape or failure in one or more CCC programs, careful review and consideration should be given regarding the suitability of participation and the length of placement.

d. Inmates with handicaps, minor medical conditions, or disabilities may also be considered for community placement. Inmates are required to assume financial responsibility for their health care while assigned to community programs. When an inmate is unable or unwilling to bear the cost of necessary medical care, the inmate is to be denied placement.

* * * *

10. CCC REFERRAL PROCEDURES. Normally 11 to 13 months before each inmate's probable release date, the unit team shall decide whether to refer an inmate to a Community Corrections program.

a. Referral to CCM. Staff shall use the Referral Form (BPS-210 (73) Attachment B) when referring an inmate for transfer to a CCC. Information included in the Additional Information (12) and Specific Prerelease Needs (13) sections must be as specific as possible and not just reference the progress report. Attachment B contains instructions for completing the Referral Form and related materials. Signed copies of the "Conditions of Residential Community Programs" (Attachment C) must be included with all CCC referrals. The Warden is the final decision-making authority for all CCC referrals recommended by the unit team.

If the Warden approves the CCC referral, the unit team shall forward two copies of the Institutional Referral Form and appropriate attachments to the CCM. Two copies of the referral are prepared so that one may be forwarded to the CCC while the CCM retains the other for reference. The referral packet must be forwarded to the CCM at least 60 days prior to the requested placement date. However, earlier referrals are encouraged to facilitate the release process.

If the placement is for 45 days or less, and the release method by parole, a copy of correspondence directed to the U.S. Parole Commission outlining the release plan and requesting parole certificates, as well as copies of U.S. Probation's letter recommending release plan approval, must be included in the referral package.

* * * *

e. Transfer Date. When CCMs are notified of an inmate's acceptance by a CCC, a transfer date to the CCC is to be established, and the CCM will enter the SENTRY destination assignment transaction. The effective date will be the approved future transfer date.

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Kathleen M. Hawk
Director

[Attachments omitted]

OPERATIONS MEMORANDUM

DATE: OCTOBER 23, 1989

SUBJECT: CREDIT FOR TIME IN CUSTODY UNDER 18 USC 3585(B)

CANCELLATION DATE: OCTOBER 31, 1990

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I. PURPOSE: TO ADVISE STAFF OF THE PROCEDURES FOR THE CREDITING OF JAIL TIME UNDER TITLE 18, U.S. CODE, SECTION 3585(B).

II. DIRECTIVE REFERENCED:

PROGRAM STATEMENT 5880.24, SEPTEMBER 5, 1979, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568".

III. BACKGROUND: PRIOR TO NOVEMBER 1, 1987, JAIL TIME CREDIT, FOR TIME IN CUSTODY BEFORE SENTENCING, WAS CONTROLLED BY TITLE 18 USC, SECTION 3568. AS STATED UNDER THAT SECTION . . . "THE ATTORNEY GENERAL SHALL GIVE ANY SUCH PERSON CREDIT TOWARD SERVICE OF HIS SENTENCE FOR ANY DAYS SPENT IN CUSTODY IN CONNECTION WITH THE OFFENSE OR ACTS FOR WHICH SENTENCE WAS IMPOSED". PROGRAM STATEMENT 5880.24, "SENTENCE COMPUTATION, JAIL TIME CREDIT UNDER 18 USC 3568", ESTABLISHED THE PROCEDURES FOR MAKING JAIL TIME CREDIT DETERMINATIONS. HOWEVER, WITH THE IMPLEMENTATION OF THE COMPREHENSIVE CRIME CONTROL ACT (CCCA) ON NOVEMBER 1, 1987, SECTION 3568 WAS REPEALED FOR OFFENSES COMMITTED ON OR AFTER THAT DATE. FOR OFFENSES COMMITTED PRIOR TO NOVEMBER 1, 1987, THE PROVISIONS OF SECTION 3568 AND PROGRAM STATEMENT 5880.24 REMAIN IN EFFECT.

IV. ACTION: THE FOLLOWING PROVISIONS OF TITLE 18, USC SECTION 3585(B), CONTROL THE CREDITING OF JAIL TIME CREDIT, FOR OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987.

SECTION 3585(B) CREDIT FOR PRIOR CUSTODY —

"A DEFENDANT SHALL BE GIVEN CREDIT TOWARD THE SERVICE OF A TERM OF IMPRISONMENT FOR ANY TIME HE HAS SPENT IN OFFICIAL DETENTION PRIOR TO THE DATE THE SENTENCE COMMENCES —

(1) AS A RESULT OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED; OR

(2) AS A RESULT OF ANY OTHER CHARGE FOR WHICH THE DEFENDANT WAS ARRESTED AFTER THE COMMISSION OF THE OFFENSE FOR WHICH THE SENTENCE WAS IMPOSED, THAT HAS NOT BEEN CREDITED AGAINST ANOTHER SENTENCE."

UNDER SECTION 3585(B), AN INMATE WILL RECEIVE JAIL TIME CREDIT ON THE FEDERAL SENTENCE, FOR TIME SPENT IN PRE-SENTENCE CUSTODY IN CONNECTION WITH THE FEDERAL OFFENSE, AND FOR ANY TIME SPENT IN PRE-SENTENCE CUSTODY AFTER THE DATE OF THE FEDERAL OFFENSE, IF CREDIT IS NOT AWARDED TOWARD SERVICE OF ANOTHER SENTENCE. FOR EXAMPLE, IF AN INMATE IS ARRESTED ON STATE CHARGES, AFTER THE DATE OF THE FEDERAL OFFENSE, AND IT IS DETERMINED THAT THE STATE DID NOT CREDIT THE PRE-SENTENCE CUSTODY TOWARD A STATE SENTENCE, THE TIME SPENT IN STATE PRE-TRIAL CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE, WILL BE CREDITED TOWARD THE FEDERAL SENTENCE.

IN THE FOLLOWING SITUATIONS, IT MAY ALSO BE DETERMINED THAT THE STATE HAS NOT AWARDED CREDIT TOWARD THE STATE SENTENCE IF:

(1) THE STATE CHARGES ARE DISMISSED.

(2) THE STATE SENTENCE IS VACATED WITH FURTHER PROSECUTION DEFERRED, THEREBY EFFECTIVELY VACATING THE STATE'S AWARD OF JAIL CREDIT,

(3) STATE PROBATION IS GRANTED, OR

(4) THE STATE ORDERS THEIR SENTENCE TO RUN CONCURRENTLY WITH THE FEDERAL SENTENCE, AND THE STATE SENTENCE WILL BE ABSORBED PRIOR TO GRANT OF GOOD TIME, RESULTING IN NO BENEFIT FROM THE STATE JAIL TIME.

ORDINARILY, IF A SENTENCE RESULTS FROM STATE CHARGES, THERE WILL BE A PRESUMPTION THAT THE INMATE DID RECEIVE CREDIT FOR THE PRE-SENTENCE TIME. HOWEVER, IF IT CAN BE DEMONSTRATED THAT THE STATE DID NOT CREDIT THE TIME, THE PRE-SENTENCE CREDIT WILL BE AWARDED FOR TIME IN STATE CUSTODY, AFTER THE DATE OF THE FEDERAL OFFENSE.

THESE PROCEDURES, UNDER SECTION 3585(B), ONLY APPLY TO OFFENSES COMMITTED ON OR AFTER NOVEMBER 1, 1987. QUESTIONS CONCERNING THESE PROCEDURES MAY BE REFERRED TO ED HAYNES, CHIEF INMATE SYSTEMS BRANCH (FTS 724-3050).

CLAIR A. CRIPE
GENERAL COUNSEL